M. L

Lex Testamentaria.

THE LAW AND THE PRACTICE

OF

NEW JERSEY

FROM THE EARLIEST TIMES

CONCERNING THE PROBATE OF WILLS, THE ADMINISTRATION OF ESTATES, THE PROTECTION OF ORPHANS AND MINORS, AND THE CONTROL OF THEIR ESTATES;

THE PREROGATIVE COURT, THE ORDINARY, AND THE SURROGATES.

BY WILLIAM NELSON,
Counsellor-at-Law.

PATERSON HISTORY CLUB.
Paterson, N. J
1909.

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Paterson, N. J.
1900

BY HIS EXCELLENCY,

LEWIS MORRIS, *Esq*; *Captain-General and Governor in Chief in and over His Majesty's Province of* New-Jersey, *and Territories thereon depending in* America, *and Vice-Admiral of the same*, &c.

To

WHEREAS the said so as aforesaid, deceased, died Intestate, having while he lived, and at the Time of h Death, Goods, Rights and Credits in divers Places within this Province, by means whereof the full Disposition of all and singular the Goods, Rights and Credits of the said Deceased, and the Granting Administration of them, also Hearing of Account, Calculation or Reckoning, and the final Discharge and Dismission from the same, unto Me solely, and not unto any other inferior Judge, are manifestly known to belong. I desiring that the Goods, Rights and Credits of the said Deceased may be well and faithfully administred, and converted and disposed of unto pious Uses, do grant unto you, the said in whose Fidelity in this Behalf I very much confide, full Power, by the Tenor of these Presents to administer the Goods, Chattels and Credits of the said Deceased, and faithfully to dispose of them; also to ask, collect, levy, recover and receive the Credits whatsoever of the said Deceased, which unto the said Deceased, while he lived and at the Time of h Death, did belong; and to pay the Debts whatsoever of the said Deceased, so far forth as the Goods, Rights and Credits of the said Deceased can thereunto extend, according to their Rate, chiefly of well and truly administring the same, and of making a true and perfect Inventory of all and singular the Goods, Rights and Credits of the said Deceased, and exhibiting the same into the Registry of the Prerogative Court in the Secretary's Office at on or before the Day of next ensuing, and of rendering a just and true Account of said Administration at or before the Day of then next following, being duly and lawfully And I do ordain, depute and constitute you the said Administrat of all and singular the Goods, Rights and Credits of the said Deceased. *In Testimony* whereof, I have caused the Prerogative Seal of the said Province of *New-Jersey* to be hereunto affixed this Day of *Annoque Domini* One Thousand Seven Hundred and Forty

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RESPECTFULLY DEDICATED
TO HIS HONOR

MAHLON PITNEY,

CHANCELLOR, ORDINARY, SURROGATE-GENERAL,
AND JUDGE OF THE PREROGATIVE COURT,
OF THE STATE OF NEW JERSEY.

PREFACE.

Once a man gets hold of property he hates to let go of it. He is eager to control it even beyond the grave. Traces of ancient customs show that long before the days of written records men were jealous of their possessions and anxious to keep them to their descendants. Hence through the ages there has grown up a vast body of law regulating the transmission of inheritances. This has seemed so sacred a matter that the church for many centuries asserted its supreme control over all that pertained thereto. The legal terminology and the phraseology of the Prerogative Court and its subordinates perpetuates the memory of this once potent sway, even in New Jersey, where it was never exercised. This little work is designed to trace the history of the jurisdiction and the practice of the Probate Courts in our state from the earliest times.

CONTENTS.

APPENDIX.

ILLUSTRATIONS.

Early Will-Making in New Jersey.

PRIMITIVE IDEAS OF PROPERTY.

The evolution of mankind from primitive savagery to barbarism, from barbarism to semi-civilization, and so to fuller civilization, has been marked at every step through the toilsome ages by a departure from the idea of tribal, or communal, or family ownership, to the conception of individual property, whereby the industrious, the thrifty, the capable, has been assured of the right to possess and enjoy that which he has acquired. As that profound student and keen observer, Morgan, puts it, basing his conclusions chiefly upon his researches among the American Indians, who present to us a picture of primitive society in the states of savagery and of barbarism: In the development of society there were two great stages—"firstly, changing descent from the female line, which was the archaic rule, as among the Iroquois, to the male line, which was the final rule, as among the Grecian and Roman gentes; and, secondly, changing the inheritance of the property of a deceased member of the gens, from his gentiles [blood-kin], who took it in the archaic period, first to his agnatic kindred, and finally to his children."[1] Sir Henry Maine, also, concludes that the earliest ownership of land was in the community, rather than in the individual, although the periodical redistribution of the land among families has been a very general custom among Aryan peoples from the earliest times. The village system, which prevails to this day among the Hindus, and which seems to have existed among Teutonic peoples to well within the historic period, was evidently derived from the primitive idea of tribal or community ownership, but at least in its later stages undoubtedly recognized individual proprie-

[1] Ancient Society, by Lewis H. Morgan, New York, 1878, p. 64.

torship to a larger extent than has been generally appreciated or admitted by students, even one so thorough as Maine.[1]

THE DESCENT OF PROPERTY.

As a natural outgrowth of the idea of individual ownership, or property, there followed the concession of the right, or at least the propriety, of keeping one's own property in one's own family, even after death; and by an easy step forward, the propriety of having the ancestor's possessions descend to his children. This, of course, was a long step from the archaic period, represented in primitive American society, when descent was in the female line. When property came to descend in the male line it is reasonable to suppose that the community, or at least the family, saw to it that the property was distributed among the sons, in such a manner as to make the best use of it for the community at large. This appears by many of the ancient Hindu laws regulating descent, as will be shown presently. The earliest written laws known to us make no provision for the testamentary disposition of property, but carefully regulate its distribution at the owner's decease.

SEMITIC LAWS OF DESCENT.

Among Semitic peoples we have that remarkable Code of Hammurabi, King of Babylon, cir. 2200 B. C., the oldest body of law that has come down to us. Of the two hundred and eighty-two sections of that Code there are twenty (165 to 184) prescribing the manner in which a man's property may be distributed by him in his lifetime, and how it shall descend at his death. Nowhere is he authorized to dispose of it by will, nor to disinherit a son, even in his lifetime, except with the approval of a court, after due investigation.

By the Hebrews, while at first the system of tribal ownership was recognized the inheritance of the first-born son was soon insisted on, and failing male issue the descent was in the female line.[2]

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[1] Village Communities in the East and the West, by Sir Henry Maine, pp. 82, 107, 165; Wilson's History of India, I., 415-420.

[2] Leviticus, xxv, 46; Numbers, xxvi, 52-56; xxvii, 1-11; xxxvi; Deuteronomy, xxi. 15-17.

The Koran carefully sets forth the manner in which a man's estate shall be distributed, making wise provision for his children, and failing issue, then for his next of kin, in which we see indications of the primitive customs of the Arabians.[1]

ARYAN LAWS OF INHERITANCE.

Among Aryan peoples, the oldest literature we have is that of the Hindus, as embodied in the Vedas, a great collection of religious hymns. Upon these have been grafted an infinite variety of religious, philosophical, sociological and legal commentaries, which have developed into systems and codes, in turn the subject of yet other commentaries. Perhaps the earliest of these outgrowths of the Vedas are the Laws of Manu, probably dating back at least 1000 B. C. According to his Laws (IX, 104–118), on the father's death the oldest son was required to support the family, and the brothers to endow their sisters. Gautama's "Institutes of the Sacred Law," dating far back toward the times of the Vedas, also provide for descent to the sons, with some modifications according to circumstances.[2] The Vâsish*tha* Dharmaśâstra (of uncertain date, but probably very ancient) provides (XVII) for the partition of the paternal estate among the sons, in certain proportions according to the mother's caste, while the daughters "divide the nuptial present of their mother."[3] Apastamba's "Aphorisms of the Sacred Law," compiled cir. 500 B. C., declare that a man "should during his lifetime, divide his wealth equally among his (capable) sons," failing which the inheritance might go to a daughter. He explains away the ancient Vedas in favor of primogeniture, and the statement that "Manu divided his wealth among his sons."[4] The "Law of Inheritance" as explained by Bṛihaspati (cir. 1 B. C.) is much the same as that given by Aspatamba, as might be expected, he following closely the an-

[1] Sura IV, 8. 12-15. J. M. Bodwell's edition. London. 1876, is excellent, the chronological arrangement of the Suras being a desirable feature: but his translation is less accurate than that of E. H. Palmer, Oxford, 1880.

[2] The Sacred Laws of the Aryas, translated by George Bühler, Part I., Oxford. 1879, pp. 299-307.

[3] Ibid., Part II., Oxford. 1882. pp. 84-92.

[4] Ibid., Part I., pp. 132-135.

cient code of Manu.[1] The Nâradasmṛiti (cir. A. D. 350-450) makes many modifications in the earlier codes, and virtually abrogates the right of primogeniture by declaring that even the youngest son may undertake the management of the family property, if specially qualified for the task, and that the mother shall share equally with the sons, and an unmarried daughter take the same share as a younger son. The "Thirteenth Title of Law" in this work, fifty-two sections, is devoted entirely to the "Law of Inheritance."[2] In the Institutes of Vishnu (cir. A. D. 400) the laws of inheritance are strictly defined, the general principle being that "among the sons each preceding one is preferable to the one next in order, and takes the inheritance, and maintains the rest," including those incapable of self-support.[3] The Baudhâyana (cir. A. D. 1100) contains elaborate regulations for the distribution of the inheritance (I, 5, 11, 11–14; II., 2, 3, 1–53), a preference being allowed to the eldest son, the other sons sharing equally, the sons of mothers of different castes, however, taking according to the order of the castes.[4]

It is doubtless true, that many of these elaborate laws were rather an expression of ideals than legislation actually in effect, but many of the customs or systems they represent, after being handed down for thousands of years, from the misty times of the Vedas, exist to-day in the "village communities" of India, which are so widespread and interesting a feature of that strange country, and which have preserved through all the ages much of the thought and practice of primitive times.[5]

This imperfect summary of the earliest laws of inheritance suffices to show the importance attached to the subject by the Semitic and Aryan precursors of the European races, and the

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1 The Minor Law-Books (Nârada, Bṛihaspati), translated by Julius Jolly, Oxford, 1889, pp. 9, 272-3, 369-385.

2 Ibid, 9, 188-200.

3 The Institutes of Vishnu, XV-XVIII, translated by Julius Jolly, Oxford, 1880, pp. 61-74.

4 The Sacred Laws of the Aryas, ut supra, Part II., pp. 224-230.

5 For a word of comment on the Hindu laws, see Max Müller's "Origin and Growth of Religion," New York, 1879, p. 143. See also "Studies in History and Jrisuprudence," by James Bryce, Oxford, 1901, pp. 97-101.

usages forming the foundation for Grecian, Roman and Teutonic legislation on the subject.

ROMAN TESTAMENTARY LAW.

Without attempting to trace the transition from primitive customs of inheritance or descent to the more artificial systems of testamentary disposition of property we may pass at once to the Roman law on the subject, the history and character of which are indicated in the summary given in the Institutes of Justinian, compiled in the sixth century A. D., wherein it is related:

"Two kinds of testaments were formerly in use; the one was practiced in times of peace, and named *calatis comitiis;* because it was made in a full assembly of the people; and the other was used, when the people were going forth to battle, and was stiled *procinctum testamentum.* But a third species was afterwards added, which was called *per æs et libram*, because it was effected by emancipation, which was an alienation, made by an imaginary sale in the presence of five witnesses, and the *libripens* or balance-holder, all citizens of Rome, above the age of fourteen; and also in the presence of him, who was called the *emptor familæ* or purchaser.[1] The two former kinds of testaments have been disused for many ages; and that, which was made *per æs et libram*, although it continued longer in practice, hath now ceased in part to be observed.

"The three kinds of testaments before mentioned all took their rise from the civil law; but afterwards another species was introduced by the edict of the prætor; for, by the honorary or prætorian edict, the signature of seven witnesses was decreed sufficient to establish a will without any emancipation or imaginary sale; but this signature of witnesses was not required by the civil law.

[1] Before the time of the Decemvirs (cir. 450 B. C.) a Roman citizen declared his wishes regarding the disposal of his property after his death, to the assembly of the thirty curiæ or parishes—a relic of tribal or gentile government. By the Twelve Tables the private testaments of the father of a family were authorized. He "promulgated his verbal or written testament in the presence of five citizens, who represented the five classes of the Roman people; a sixth witness attested their concurrence; a seventh weighed the copper money, which was paid by an imaginary purchaser, and the estate was emancipated by a fictitious sale and immediate release." See Gibbon's admirable discourse on the Civil Law, Chap. xlv. of his "Decline and Fall of the Roman Empire;" Livy. Lib. iii. caps. 33-35.

"When the civil and prætorian began to be blended together partly by usage, and partly by emendation, made by the imperial constitutions, it became an established rule, that all testaments should be made at one and the same time according to the civil law; that they should be sealed by seven witnesses according to the prætorian law, and that they should also be subscribed by the witnesses, in obedience to the constitutions. Thus the law concerning testaments seems to be tripartite: for the civil law inforces the necessity of having witnesses to make a testament valid, who must all be present at one and the same time without interval; the sacred constitutions ordain, that every testament must be subscribed by the testator and the witnesses; and the prætorian edict requires sealing, and fixes the number of witnesses.

"What we have already said concerning written testaments, is sufficient. But if any man is willing to dispose of his effects by a nuncupative testament; i. e., by a testament without writing, let him be assured, if, in the presence of seven witnesses, he declares his will by word of mouth, that such verbal declaration will be a complete and valid testament according to the civil law."[1]

THE ROMAN-DUTCH LAW IN NEW NETHERLAND.

The civil law codified in Justinian's time was somewhat modified in Western Europe, and in Holland a new code (a "Political Ordinance") was adopted in 1580, elaborating and defining the Roman-Dutch Law. According to this system wills could be made orally, or in writing.

Orally, or by word of mouth, by expressing one's wishes as to the disposal of the property, to an alderman and the secretary of the local court, or to a notary in the presence of two witnesses, whereupon the notary reduced the will to writing, and it was then signed by the testator and the witnesses, and the notary made a record of the transaction in his official minutes.

In writing, which having been signed and sealed was handed to a notary in the presence of two witnesses, the testator

[1] Justinian's Institutes, Lib. II., Tit. X., 1. 2. 3. 14. Private Law among the Romans, from the Pandects, by John George Phillimore, London, 1863, pp. 328-416.

at the same time, in their presence, declaring it to be his testament. The notary endorsed it accordingly, and made a minute in his records, which was signed by the testator and the witnesses. The notary also kept the original will in his custody, to be produced only on the death of the testator.

No public record of wills was required, or authorized—a fact causing untold regret on the part of persons who have vainly sought for data of their Dutch ancestry in Holland. The wills and the records of their execution and attestation were kept by the notary who reduced them to writing, and by his family afterwards. The notary being a public, judicial officer, his action in the matter of wills was regarded as equivalent to the proof and probate required in the English courts.[1]

SOME DUTCH WILLS AND ADMINISTRATIONS.

The Roman-Dutch law carefully guarded the rights of infants, and of intestates, and in the government of New Netherland the Director-General and Council of the Colony exercised jurisdiction in such matters, the same being afterwards delegated to the Burgomasters and Schepens, who sat as an Orphans' Court. In 1656 Orphan Masters were appointed, to take cognizance of the rights of minors. From the records of this body the following extracts are taken, as illustrating in some measure the manner of making wills, the administration of estates, and the protection of the interests of orphans:

1656, January 20. "Govert Loockermans and Pieter van Couwenhoven, guardians over the infant children of Jacob van Couwenhoven and his deceased wife Hester Jansen, appearing produced a testament, made by said Hester Jansen, dec'd, and Jacob van Couwenhoven, before Notary D. v. Schelluyne and witnesses April 20, 1653, also evidence of the property left by their mother to the children, sworn to by Couwenhoven before said Notary October 2, 1655, and an inventory of the children's jewels and clothing. They request that pursuant to the custom of our Fatherland the money of the children may be deposited with the Orphan chamber or put out on mortgage, so that they might not be prejudiced in their rights. Considering the re-

[1] Van Leeuwen's Roman-Dutch Law, sub Testamentum.

quest reasonable, the Orphan-masters provisionally order, that the testament and the proof of property shall be recorded in the Secretary's office, and whereas Couwenhoven is at present not in good health, that he shall be spoken to about it."[1]

1656, May 5. "Whereas Cornelis Groesen and his wife Lysbet N. have come to their death during the latest disaster with the Indians, and it is reported that they have left some goods at the house of Jan Schryver, the tailor, therefore the Orphanmasters P. Leendertsen van die Grift and Pieter Wolf. van Couwenhoven, having deemed it advisable, so that the children, now captives of the Indians, when they return, may have the benefit of them and debtors as well as creditors may come to their rights, this inventory was taken by the Orphanmasters in the presence of the Deacons of this City on the 20th of April 1656, as more fully appears by the record of inventories, and as some goods were found which would be of no use to the children, and as money is required to ransom them and to pay outstanding debts, the Orphanmasters have decided to sell to the highest bidder at auction the movable goods, which was done on May 4th, 1656, and recorded May 5th. Agreeably to the notice affixed, everybody is notified, that if he has anything to claim from the estate left by Cornelis Groesen, dec'd, he must report it between to-day and next Monday, May 8th, to the Secretary of this City, Jacob Kip, with specications and proofs, under the penalty of being debarred from his claim in the future."[2]

1657, November 28. "Whereas, Roelof Jansen, mason, has died at the house of Arent Lauwerensen, on the 16th of this month of November, 1657; and whereas said Arent Lauwerensen by a petition to the Burgomasters and Schepens of this City has requested that they would please to direct and authorize one or two persons to sell at public auction to the highest bidder, according to inventory, the property left by said Roelof Jansen, that thus might be paid the expenses of his funeral, his house rent and other known and unknown debts, Therefore their said Worships order the Orphanmasters to en-

[1] Minutes of the Orphan Masters of New Amsterdam, 1655 to 1663, translated and edited by Berthold Fernow, New York, 1902, pp 12-13.

[2] Ibid, 15-16.

ter upon said estate and to do therewith what ought to be done, and they herewith authorize and direct Sieur Mattheus de Vos, Notary Public, and Arent Lauwerensen to have the estate sold at auction by the Secretary of the Burgomasters and Schepens, as well as of the Orphanmasters, whereby the debts, as above stated, shall be paid, and the surplus handed to them to dispose of as they shall find best."[1]

1657, December 12. "Anna Claas, with Sieur Mattheus de Vos, Notary Public, and with Arent Lauwerensen, administrator of the estate of Roelof Jansen, mason, dec'd, appeared and proved by the affidavits of two credible persons that said Roelof Jansen, dec'd, had given her in his lifetime his everyday clothing, his gun, powderhorn and what belonged to it; she also produces an account for house rent, for caretaking and money advanced, amounting to 99 fl.18 st., wherein are included 7 beavers, the balance being in wampum. She requests that the affidavits and the account may be approved. The orphanmasters approve the affidavits and account, ordering their Secretary to pay the account, after deducting what the husband of said Anna Claas has bought from the estate."[2]

January 11, 1658. "Appeared Class Bordingh and Pieter Jacobsen, administrators and guardians of the estate of Anna Cornelis and of her son Jacob Jacobsen, who produced the inventory of as much as they could find of said estate, and stated that as part of the goods were missing they could do no more. Lauwerens Lauwerensen and Jacob Jacobsen appeared, and Lauwerens was informed that following the customs and laws of the Fatherland it had been considered necessary to appoint administrators for the estate of Anna Cornelis, dec'd, and that much of it was missing. He answers, that over 400 fl. were paid for funeral expenses, and if anything is missing he does not know where it is. The Orphanmasters order Lauwerens Lauwerensen to give a satisfactory account to the administrators and to make an agreement with them; also that the missing property shall be offset by the funeral expenses;

[1] Ibid., 38-39.

[2] Ibid., 41-42.

the administrators were to dispose of the goods to the best advantage of the estate and benefit of Anna Cornelis' son."[1]

1658, April 2. "Whereas, Bruyn Barenzen, late cooper at Breuckelen, has died at the house of Mighiel Jansen on the 12th of February of this year 1658, therefore the Orphanmasters of this City of New Amsterdam request and commission Jan Eversen Bout with Mighiel Jansen to administer upon the estate left by said Bruyn Barenzen, to sell his goods at public auction, and to inform the Orphanmasters of the amounts received."[2]

1659, April 9. "Catalyntje, the wife of Joresy, coming in says that a man called Abraham Jansen van Salee, alias the Turk, who had lived at her house, was dead, having made a testament whereby he has devised his property to the negro-woman and the child he has had by her, Joresy having been named executor. She says the Deacons of the City have attached and seized the property, and she had been to the Director-General, who had referred her to the Orphanmasters. As the domicile is not within this jurisdiction the case was not taken up by this Board, but again referred to the Director-General and Council."[3]

1659, August 2. "Cristyntje Cappvens came before the Board and stated that she and her husband had made a testament, showing it to the Board. It was found on reading it that the Orphanmasters are excluded, but as there is no mention of guardians for the child nor a settlement upon the same of the paternal inheritance, she requests that as guardians may be appointed the Hon^ble^ Paulus Leenderzen van der Grift, selected by both, and Dirck Jansen Croon, thereto requested by her deceased husband, who had accepted the office, but said Dirck Jansen Croon not being here, she asks that the Hon^ble^ Pieter Wolfertsen van Couwenhoven may provisionally act in his place, which is allowed."[4]

1659, September 27. "Whereas Jacob Coppe has died and there has been found among his papers and property here a testament, made December 14, 1653, before Notary D. van

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[1] New Amsterdam Records, VI., 42.

[2] Ibid., 43.

[3] Ibid., 84.

[4] Ibid., 104.

Schelluyne and witnesses, in favour of Lysbett Cornelis, daughter of Cornelis Aarsen, and Merritje Jans, daughter of Jan van der Bilt, naming them both heiresses of his estate, Therefore the Orphanmasters have resolved to appoint administrators of said estate, so that the heiresses may come to their own, and they have elected and authorized, as they hereby do, Timotheus de Gabry and Isaacq Kip, who are directed to make as soon as possible a complete inventory of all the goods and property left by Jan Coppe, his debts and credits here in the country, as well in this place as elsewhere, and to report the same to the Orphans Court, to be then disposed of, as shall be deemed advisable."[1]

1659, November 13. "Jan Jansen de Jongh, widower of Cornelia van Vloet, dec'd, intending to marry Mrs. Catharina Brull, shows a testament made by him and his late wife before Notary Dirck van Schelluyne and witnesses, October 31, 1655, containing the last will of both, as follows: they first revoke and annul all former testaments, last wills, etc., made by them either singly or jointly, especially the testament made before said Notary and witnesses May 13, 1653, wherein they name and institute as heir, as they have no child, the survivor of them both, to have all property, real and personal, stocks, credits, money, gold, silver, coined or not coined, jewels, clothing, linen or woollen, household goods and others, including legacies and bequests, either already received by testators from their parents or collateral relatives, or to be received from intestates, or under a testament, during the life of the first one of them dying, nothing in the world excepted or reserved, as well here in this country, as in Holland, Brabant, the Duchy of Bois, the Barony of Breda, or elsewhere; to have all forever, use it as inherited property, and do therewith as is done with one's own free property, without anybody's interference, they, testators, promising each other never to act against or change this, their last will."[2]

The last will and testament of Deltien Lubbertse, dated January 2, 1664, was presented for probate before the Mayor and Aldermen of the city of New York, Nov. 30, 1664.[3]

[1] New Amsterdam Records, VI., 110. [2] Ibid., 120-121.

[3] Annual Report of the State Historical Society of New York, for 1896, pp. 141-5.

The absence of written records renders it quite impossible to determine with precision the law of inheritance among the Germanic or Teutonic peoples two thousand years ago. According to Tacitus (cap. xx) "Heredes tamen successoresque sui cuique liberi: et nullum testamentum. Si liberi non sunt, proximus gradus in possessione fratres, patrui, avunculi." Here was the law of descent, simply, on much the same lines as among the Aryan and Semitic peoples two thousand years earlier.

It is a striking illustration of the slight impression made by Roman institutions on the people of England, that the Roman law left not a vestige of its influence on the institutions of that country after the conquerors had withdrawn. The latest researches fail to reveal any trace of testaments among the Anglo-Saxons before the ninth century, and even those seem to have been rather in the nature of post-obit gifts, than of wills in the modern acceptation of the term.

In the laws proclaimed by Alfred, cir. 890, for example, it was declared (cap. 41): "The man who has boc-land, and which his kindred left him, then ordain we that he must not give it from his mæg-burg [kindred], if there be writing or witness that it was forbidden by those men who at first acquired it, and by those who gave it to him that he should do so."

"The ordinance of Ethelred [A. D. 978–1016], and his witan ordained as frith-bot for the whole nation, at Woodstock, in the land of the Mercians," provided (cap. 71): "If anyone depart this life intestate, be it through his neglect, be it through sudden death; then let not the lord draw more from his property than his lawful heriot. And according to his direction, let the property be distributed very justly to the wife and children and relations, to everyone according to the degree that belongs to him."[1]

That there was testamentary folk-law, or borough-law, seems probable. Indeed, in the gradual growth of royal authority, when the devise of land was condemned, borough customs were spared. By the thirteenth century the system of primogeniture had become firmly established, so that a man could no

[1] Stubbs's Select Charters, etc., Oxford, 1870, 62, 73.

longer dispose of his lands by will—except burgage tenements—and could only bequeath his chattels. After nearly three centuries the statutes of 32 and 34 Hen. VIII. gave the power of devising to all having estates in fee simple, except in joint tenancy, over the whole of their soccage land, and over two-thirds of their lands holden by knight's service. This power was extended by statutes of 12 Charles II., cap. 10, and 29 Charles II., cap. 3. The last-mentioned act prescribed the method of executing wills, requiring them to be in writing, signed by the testator, or by some person for him, in his presence, by his direction, and attested and subscribed in his presence by three witnesses.

The administration of estates was taken charge of by the church, professedly in the interest of the soul of the deceased testator or intestate, and the executor became the personal representative of the deceased. The will was proved in "the court of the judge ordinary, who was in the normal case the bishop of the diocese." At a later period it was decided that if the testator had goods worth more than five pounds in each of two dioceses, the executor should seek a "prerogative" probate in the archbishop's court. The goods of intestates were at the disposal of the judge ordinary, who in 1285 was by statute required to pay the intestate's debts out of such chattels.[1]

This system was gradually extended, until sustantially all matters connected with the proof of wills, the granting of letters of administration, and of guardianship, and the administering of estates,[2] was entrusted to or absorbed by the ecclesiastical courts. When England separated from the See of Rome this jurisdiction, by the statute of 23 Hen. VIII., was declared to

[1] History of the English Law, by Sir Frederick Pollock and Frederick William Maitland, 2d ed., Cambridge, 1899, II., 314-356; Constitutional History of England, by William Stubbs, Oxford, 1880, III., 372; 3 Blackstone's Com., 96; 1 Stephen's Com., 5th ed., 599-602; Coke Littleton, 111-112; Co. Inst., 7; Historical Essay on the Magna Charta, etc., by Richard Thomson, London, 1829, pp. 208-210. Hargrave, in his note on Co. Litt., 111, declares that "the testamentary power over land was certainly in use among our Anglo-Saxon and Danish ancestors." The statement is chiefly based on Wright's Tenures, and cannot be substantiated by any documents known to us at this day. As for certain testamentary customs, see Blount's Jocular Tenures, London, 1698; also Lex Custumaria: or, a Treatise of Copy-hold Estates, etc., by S. C., London, 1696.

[2] That is, personal estates, the executors taking no title to the lands of their testators.

be in the bishop, or ordinary, of the diocese,—so called, says my Lord Coke, who was a better authority on law than on etymology, English or Latin, "*quia habet ordinariam jurisdictionem in jure proprio, et non per deputationem*, the name we have anciently taken from the canonists, and do apply it only to a bishop, or any other that hath ordinary jurisdiction in causes ecclesiastical"[2] —and in cases of goods of the value of £5—*bona notabilia*—in another diocese, in the Metropolitan, the archbishop of Canterbury, or in the archbishop of York. The bishop exercised this jurisdiction by an official, called his chancellor, and sometimes called the ordinary, who was his surrogate; the archbishop, who claimed it by way of special prerogative, by an official called the judge of the prerogative court, a name derived from the fact that the jurisdiction in such cases was by the archbishop's prerogative.[3] An appeal lay from the ordinary to the prerogative court, whose sentence was without appeal, until a statute of 24 Hen. VIII. gave an appeal to the King in chancery, which was heard before delegates appointed under the great seal, and who were called the court of delegates.

NUNCUPATIVE WILLS.

In times when the art of writing was confined almost exclusively to the clergy, and when landowners very often met with sudden deaths, in battle or in broils, written wills were usually or at least frequently out of the question. So the law recognized nuncupative wills—made orally in the presence of witnesses, and afterwards reduced to writing by someone who heard the declaration of the testator.[1] The statue of 29 Chas. II., cap. 3, requiring all wills to be in writing, signed by the testator, practically forbade nuncupative testaments.

THE PROBATE OF WILLS IN NEW ENGLAND.

The Plymouth Colonists had to face new conditions in a New World. They expressly denied all ecclesiastical author-

[1] Co. Litt. 111a.

[2] Co. Litt. 90 b, 96 a. 344 a.

[3] Co. Litt. 96 a. 344 a: Hale C. L. 35: Burn's Ecclesiastical Law; William Nelson's Lex Testamentaria: 3 Stephen's Com. 305 n. See an interesting review of the subject in the case of Harris v. Vanderveer's Executor, 21 N. J. Eq. (6 C. E. Gr.). 452.

ity in secular affairs, and as there was no ecclesiastical court—neither bishop nor archbishop—and they were at liberty to make their own laws,[1] they provided for the probate of wills before the Governor and Assistants, by an act passed in 1633. The practice during the first twelve years of the settlement does not appear from the statute books, but doubtless the act in question was substantially a reduction to writing of the custom that had previously prevailed in the Colony. This law was as follows:

"It is enacted by the Court that the will and Testaments of such as die bee ordered proued before the Gou^r and Assistants the next Court after the pty is deceased prouided the court bee not within one month after the death of the Testator and a full Inventory duely vallued bee p^rsented with the same before letters of adminnestration bee granted to any; of all the goods and Chattels of the said prsons; alsoe if incase any man die without will; then his goods bee by his wife or other nearest to him Inventoried and duely vallued and p^rsented to the Gou^r and assistants att the time forementioned and if it be a single pson without kinred heer resedent; that then the Gou^r appoint some to take a Just Inventory of the same vpon oath to bee true and Just as in other the cases before mentioned."[2]

This act was continued in the revision of 1658, and subsequently.

The propriety of nuncupative wills was obvious in a new settlement, and in 1645 this law was made:

"It is enacted by the Court that if any man being weake and sicke and otherwise of disposing memory do declare his mind and will concerning the disposing of his lands or goods before two or more of the ffreeholders of the place where hee liues;

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[1] At a General Court of the Governor and Company of the Mattachusetts Bay in New England, holden at London, the 30th April, 1629, it was ordered that the Governor and Council of the Colony should have power "to make, Ordaine and establish, all manr of wholesome & reasonable lawes, Orders, Ordinances, & Constitucons, (soe as the same bee noe way repugnant or contrary to the lawes of the Realme of England,) . . . for the futherance and prpagating of the said Plantacon, and the more decent & Orderly Gournmt of the inhabitants resydent there." See Transactions and Collections of the American Antiquarian Society, III. 40.

[2] Plymouth Colony Records, Boston, 1861, pp. 15, 112, 195.

It shalbee vpon theire oathes recorded and remain feirme according to such deuise or bequest."[1]

The Colonies of Massachusetts Bay, New Haven and Connecticut had similar laws, and the first English settlers of New Jersey, coming as they did from those Colonies, brought with them their ideas of legislation on such subjects, derived from their experience.

EARLIEST NEW YORK LEGISLATION.

The laws published at Hempstead, Long Island, March 1, 1665, by Colonel Richard Nicolls, the Duke of York's first Governor, set forth with much precision the procedure in cases of administration.

"Upon the Death of any person the Constable with two Overseers of the parish shall Repair to the house of the deceased party to enquire after the manner of Death and of his Will and Testament and in Case none doth Appear, or shall be produced, it may be taken for granted that the Person Dyed intestate And in the Presence of the Widow Children and other Relations, if any such therebe or if any such refuse to be present, It shall be lawful for the said Constable in the presence of the Overseers to make a due Search and enquiry after the estate of the deceased and within eight & forty hours after, he is to deliver in writing and upon Oath his full knowledge, to the next Justice of the Peace and the said Justice of y^e^ peace is impowered to send out warrants to take Security against any embezelment or disposal of y^e^ said Estate under any pretence whatsoever, until the next Court of Sessions where all Cases of Administration within that Liberty shall be Adjudged.

"The Estates of all Persons dying intestate who have neither the Relations of Children Brothers or Sisters or their Children Uncles or Aunts or their Children for want of such heires shall, Elapse to the King provided always that Such Elapsing shall not hinder the Lawfull Claymes of any Such Relations afore mentioned, if it be made appeare upon Oath to the Court, within one year and Six weeks.

"That no Administration be granted untill the third Sessions

[1] Plymouth Colony Records, pp. 46, 113, 195.

after the parties decease, except to the Widdow or Child, and then to be immediately granted to the said Widow or Child bringing in Sufficient Security for the performing all things the Law requires and saving the Court harmeless, And in case the widow or Child do Administer the Estate shall be Inventoryed and Apprisement made by four Men appointed by the Court and sworne by a Justice of peace which Inventory or apprizement shall by the said widow or Child be brought into the next Court of Sessions, unless the Court for reasons showed them may think fitt to grant Liberty to bring it in the Court following. But in case the deceased Dye without widow or Child, then the estate, for the better improvement thereof shall be sould by order of the Court at an Outcry, and the purchasers all puting Security, and Acknowledging Judgment for their debt which by the Court shall be Assigned to the several Creditors of the dececdant,[1] and paid according to the priority of Law and the Surplusage remaining, if any, to be delivered to the next kinsmen of the descendant,[1] if he appears or if none prove himself such within one year and six week, Then the Court to give an accompt of the said Surplusage to the Governour. And when the widow or Child Administers the surplusage after debts paid and the funerall Charges according to the quality of the person allowed for, shall be equally divided between the Widow and Children, viz. one third of the personall Estate to the widow and the other two thirds amongst the Children, provided the Eldest Sonne shall have a double portion, and where there are no Sonnes the daughters shall Inherit as copartners, and if any of the Children shall happen to dye before it come to age his portion shall be divided amongst the Surviving Children.

"Whoever pretends to Administer upon any Estate shall bring to the Court Sufficient Security, before the order shall be granted, And an Order thus obtained legally by giving in such Security to be truly accomptable to bring in a true Inventory, and to perform such things as Administered by Law are, required or enjoyned, shall not at any time after be reserved, unlesse the party that obtained the Same, dye before he hath given

[1] Decedent.

an Accompt of the estate and obtained his Quietus in which case the Court is Impowered to grant the Administration of that Estate so not Accompted for to some other person who may by virtue thereof call the heirs Executors or Administrators of the former Administratores to accompt who shall pay out of the deceased Administrators Estate all such debts as shall be found due to the estate he administered upon in the first place.

"If any Executor nominated in any will and knowing thereof shall not at the next Sessions which shall be above thirty days after the decease of the party; or shall not cause the same to be recorded by the Recorder or Clarke of that Court within that Jurisdiction the deceased party last dwelt. Or if any person whatsoever shall not within the same time take Administration of all such goods as he hath, or shall enter upon of any party deceased, or if any person or persons shall alienate or Embezell any lands or goods before they have proved and recorded the will of the deceased or taken Administration, every such person so administering, or Executing shall be lyable to be sued, and shall be bound to pay all such debts respectively as the deceased party owed whether the estate of the deceased weare sufficient for the same or not and shall also forfeit.

"If any person shall renounce his Executorship or that none of the friends or kindred of the deceased party that shall die intestate shall seeke for Administration of such persons Estate, then the Constable of the Town where any such person shall die, shall give notice thereof to the next Court of Sessions; that so the Court may take order therein, as they shall think meet, who shall allow such Constable due recompence for his pains But if the Constable shall fail therein, he shall forfeit forty Shillings to the publique Treasury.

"That the Clarke of the sessions when he carries the Probates or Commissions of Administration to be signed do then also Certify unto the recorders Office at New York, the name of the testator or the party deceased the Executors or Administrators and their Security, the County and Parrish where they dwelt And the Court wherein the Administration is granted to

the end that strangers and other Creditors invested[1] in the Estate may be the better Enabled to find out the Records in which the Accompts of the estate is entered and be informed how they may come to their just dues.

"Memorandum That what is here spoken of Executors or Administrators the like is ment; and intended also of Executrixes & Administratrixes who in such Cases are to have the same privileges."[2]

At the General Court of Assizes held in New York, September 28–October 4, 1665, it was ordered:

"That all Orignall Wills after haveing beene prooved att the Court of Assizes or Sessions and returned into the Office of Records att New-Yorke shall remain there, and the Executors Administrators shall recieve a Coppie thereof, with a Certificate of its being allowed and attested under the Seale of the Office.

"Administration may be granted by the Court to any Person, the Second Sessions, but to widow or Child, Brother or Sister immediately.

"A (Quietus) is to be procured within a yeare and six weeks after Administration is granted or a will prooved.

"That Wills and Administrations of Estates under the vallew of one hundred Pounds, are not obliged to bee Recorded at New Yorke."[3]

The will of William Ludlam, of Southampton, was proved at the Court of Assizes, New York, Nov. 2, 1665.[4]

The will of Mary Gardiner, of Maidstone, alias East Hampton, L. I., was proved October 5, 1665.[5]

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[1] Interested.

[2] Duke of Yorke's Book of Laws, 1664–1682. Harrisburg, Pa., 1879. pp. 5-6. These laws were extended from time to time over the whole of the territory under the dominion of the Governor of New York for the time being, and so applied at times to parts of New Jersey.

[3] Ibid., pp. 61, 66. Annual Report State Historian of New York, for 1896. p. 145. The Governor and Council made orders in November, 1669, and in October, 1670, requiring wills and all proceedings in relation to estates to be recorded. Ibid., 163, 168-9.

[4] Abstracts of Wills on file in the Surrogate's office, in the city and county of New York. Collections of the Historical Society of New York. XXV. (1892). pp. 1, 3.

[5] Ibid., 1.

Letters of administration were granted July 10, 1666, by Gov. Richard Nicoll, on the estate of Francis Cregier.[1]

The will of Edward Jessup, of Westchester, was proved at Flushing, November 14, 1666, "at Sessions, by the Governor's special order."[2]

At a Court of Sessions in Southampton, L. I., November 16, 1665, administration was granted to John Concklin, jr., on the estate of his wife's former husband, William Salmon.[3]

After the English had conquered New Netherland, the Mayor's Court of New York continued to act as an Orphans' Court, in the same manner as the Burgomasters and Schepens had formerly done, and wills were drawn up and executed—at least among the Dutch—frequently after the ancient custom. The following instances illustrate the maner in which the Duke of York's Laws were practically applied by the Mayor's Court, succeeding to the functions of the Dutch tribunal:

"Octob^{r}. the 30th, 1666. Att a Mayors Court held at New York. Present Capt^{n}. Thomas Willet, Mayor, M^{r}. O. Stevenson, M^{r}. John Lawrence, M^{r}. Corn. Steenwyck, M^{r}. Johannes de Peyster, Ald^{r}men; M^{r}. Allard Anthony, Sheriff.

"M^{r}. Timothy Bigs Presentinge to the Court Certaine Last Will of Charles Darrel Late deceased & the Inventorie of his Estate; w^{ch}. said Will & Inventorie beinge proved in Court to be Legally made; The honn^{ble}. Court did order that the s^{d}. Will and Inventorie should stand & Remaine in itts full force & Virtue & that the same should be entered accordinge to Lawe.

"James Willet & M^{r}. Wheat have declared & Testified to the Court uppon oath, that the Will of Charles Darrel late deceased, by M^{r}. Bigs presented to this Court, was the act & deed of the s^{d}. Darrel, as alsoo that the s^{d}. Darrel (as farre as they Could apprehend) had his good memorie when he made the s^{d}. Will.

"Timothy Bigs hath on this day declared uppon oath to the Court, that to his Knowledge uppon the Prizing of the estate of the above$^{s d}$. darrel, he hath declared al the Estate to the Prizers of what he knewe of."[4]

[1] Abstracts of N. Y. Wills, ut supra, 3. [2] Ibid., 4. [3] Ibid., 4-5.

[4] New Amsterdam Records, New York, 1901, VI., 43.

A petition was presented to the Governor, April 26, 1670, by the children of Samuel Palmer, late of Westchester county, deceased, asking that letters of administration should be granted to his widow, that she might have the benefit of his small estate.[1]

Gov. Lovelace confirmed, July 23, 1671, the appointment of orphan masters by the Mayor's court of New York.[2]

"At a Mayors Court held at New Yorck, September 19, 1671, Gabriel Minvelle produceing in Court the Will & Testament of Capt. Jno. Julius Late Commander of the Ship the Dorathe now riding at Ancor in the harbour of the Citty; by wch. Will he was made Executor to administrate the effects now aboard of the sd. shipp desireing that the sd. will might be proeved by the Witnesses and Confermed by the Court. Whereuppon the Witnesses to the sd. Testament to wit Mr. Balthazar de Haert, Mr. Claes Verbraeck, Mr. Philip Johns & Geo: Sparr being Call'd and appearing in Court, attested together wth. Secretary Nicolaes Bayard that they had bene present in Makeing of the sd. Will; and that the sa. John Julius had his full understanding as farre outwards could be perceived."[3]

"Att the Court of Mayor and Aldermen, held at New Yorke, by his Mayesties. Authority, October 24, 1671:

"On this day was the Will & Testament made betwixt Abram Verplanck and his late Wife Maria Vinge bearing date the 9th. of August 1670. And made by the Notary Dirck van Schelluyne, proeved and allowed of in Court."[4]

"Att a Mayors Court held In New Yorke, January 23, 1671–2: Jacob Teunissen Kaay & Jacques Cousseau, together with Peter Jacobs Marius, who being substituted by Jan Hendricx van Bomel, executors of the Will and Testament of Balthazar de Heart, deceased, this day appearing in Court and producing the sd. Will made and attested by the Notary Willem Bogardus in the presence of Hans Kierstede & Thymon van Borsum, bearing date the 4th. of this Instant, and desired the approbation of this Court thereuppon; Whereuppon the

[1] Annual Report of the State Historian of New York, for 1896, p. 259.
[2] Ibid., 316. [3] New Amsterdam Records, VI., 329. [4] Ibid., 339.

s^d^. Wittnesses being Called and appearing in Court, and declaring that they had bene present in Makeing & signing of the s^d^. Will; The Court thereuppon Ordered that it should be entred that the said Will was approeved of by the Court, as a Lawfull Will and that the s^d^. Executors where Empowered to Proceed in their Administrations according to Law, and do hereby authorize the Secretary Nicolaes Bayard to be present in Makeing of the Inventory."[1]

In many instances the appointment of administrators was made directly by the Governor for the time being, as in 1668, by Gov. Ri. Nicolls; in 1671, by Gov. Francis Lovelace; in 1672, by Gov. Edmond Andross.[2] The Court of Mayor and Aldermen of the City of New York acted in other cases.[3]

EARLIEST PROBATES OF WILLS IN NEW JERSEY.

When New Jersey was granted (March 12, 1664) by Charles II. to the Duke of York, and by him (June 23–24, 1664) to the Lords Proprietors—Lord John Berkley and Sir George Carteret—the latter appointed Philip Carteret (February 10, 1664–5) to be Governor of New Jersey. The origin and history of the sovereign power of the Colony, ultimately vesting in the Governor, has been traced in the Introduction to Volume XXII. of the New Jersey Archives, pages lxi–lxvi. No record has been found of the probate of any will in New Jersey for more than five years after the arrival of Gov. Carteret in the Colony, and there was no legislation or public order on the subject until he had been here ten years. Yet there can be little doubt that he exercised the functions of Ordinary or Surrogate-General, as part of the supreme power of government which had devolved upon him. It is not unlikely, however, that the Dutch inhabitants continued to follow their old way, to some extent, permitting the wills of deceased testators to remain in the custody of the notaries drafting them, and settling intestates' estates by mutual agreement, or with the assistance of the church consistory. The settlers at Eliza-

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[1] New Amsterdam Records, VI., 357.

[2] Abstracts of N. Y. Wills, ut supra, 8, 21, 25, 27.

[3] Ibid., 12, 22, 29, 30.

bethtown and at Monmouth having received their patents from Col. Nicolls (the former December 1, 1664, and the latter April 8, 1665) prior to the coming of Governor Carteret (who arrived at New York July 29, 1665), were naturally reluctant to yield allegiance to the Lords Proprietors, especially as that involved the payment of quit rents to the new owners of New Jersey. Hence they would be disposed to follow the practice in the matter of wills laid down in the Duke of York's Laws, published on Long Island, whence a large proportion of those settlers had come. The Newark colonists, in the absence of other regulations on the subject, doubtless adhered to the usage to which they had been accustomed in Connecticut. The Swedish settlers on the Delaware undoubtedly were governed by the Civil Law, prevailing in their fatherland, and which in that country was much the same as in Holland. But in a new country, with a scanty population, widely scattered, and the merest shadow of a central government, each settlement or community must have been, practically, self-governing in most of its internal affairs.[1] In a compact settlement like Newark or Elizabethtown, with say two dozen families, all of them intimate, bound together by the interests of common ownership, and many of them by ties of kindred, what more natural than a reversion to primitive communal government? If a man died, his will—if he made any—would be read at his funeral, in the presence of the whole community, and the settlement would see that it was carried into effect, even though there should be no probate of the instrument. If he died without a will, the entire body of citizens would administer upon his estate and deal even and exact justice to the widow and children. The writer has seen wills made in the latter part of the eighteenth century which were never proved or recorded, but which were carried out in perfect compliance with their provisions. The earliest record that has been found of any order by Governor Carteret relative to administering upon an estate is the following, under date of December 20, 1670:

"By Phillip Carteret Esq^r^ Governor of the province of New Jersey. Whereas Daniel Greasy late of Woodbridge,

[1] See Newark Town Records (Collections N. J. Historical Society, VI.), 1866, pp. 1, 14, 21, 22, 29, 33, 35.

planter, dyed Intestate and Leaving only a Widow behind him Without any Children or any other relations or kindred to survive him In his Estate, I have thought fitt at the Request of said Widow Catherine Greasy, To nominate and appoint And doe by these presents nominate and appoint her the said Catharine Greasy to be Administratrix to her aforesaid husband deceased Estate of Land, Goods and Chattels, movable or Immovable, she together with the overseers here following nominated and apointed, taking a true Inventory of her said husband's Estate that he left behinde him, and to Returne the same Vppon them into the secretaries office, out of which said estate shee Is to pay and satisfie all Just Debts that Where dew and owing by her said deceased husband—And likewise shee hath hereby full powers to sue, recover and receive all such debts, that are and where Justly due Vnto him, and for the better ℔forming of the ℔mises I doe hereby appoint John Smith Scotchman and Samuel Moore both of the towne of Woodbridge, to be the overseers and assistants Vnto her the said Widow, and I doe further Give and Grant Vnto the said Widow Catharine Greasy that after shee has satisfied all Just debts and funeral Charges as aforesaid to bequeath and dispose of the Remainder as shee shall think fitt, In Confirmation Whereof I have hereVnto subscribed and affixed the seale of the province the 20th Xr 1670."[1]

A few weeks later we find the following entry:

"Joshua Peirce late of Woodbridge, planter, died intestate leaving a widow and two small children behind him, the governor appoints his widow Dorathy Pierce administratrix, to pay and satisfy his just debts, and with power to sue, recover and receipt for debts due him in his lifetime. After she hath satisfied all just debts and funeral charges as aforesaid to dispose of the remainder for the best advantage of herself and her said children as she shall think fit. February 27, 1670."

The next record of the kind is six months later:

"Lawrence Ward, late of Newark, died intestate, without children, leaving only his widow upon his estate; and the said widow, Elizabeth Ward, renounced in favor of her sister Ese-

[1] E. J. Deeds, Liber 3, p. 38. [2] Ibid., p. 41.

bell Baldwyn, wife of Joseph Baldwyn, of Hadley in Massachusetts, upon condition that the said Elizabeth Ward, widow, shall enjoy the said whole estate during her life and to dispose of one-third part thereof remaining at the time of her death as she shall think good. The Governor accordingly appoints Isebell Baldwyn administratrix, September 2, 1671.

"Esebell Baldwyn declares that whereas Lawrence Ward, late of Newark, my brother, deceased intestate, etc., leaving a widow, my sister Elizabeth Ward, upon the estate of my deceased brother, I appoint my son John Catlin and John Ward, turner, my kinsman, both of Newark, attorneys to take unto them jointly all my whole power and interest in and to the said estate, etc. September 4, 1671."[1]

In the case of the last will and testament of Hugh Roberts, of Newark, dated February 26, 1670, the record declares that it was signed, sealed and delivered in the presence of Capt. Robert Treat, who makes oath, November 22, 1671, that "this will above mentioned is the last will and testament of the said Hugh Roberts to the best of his knowledge," the proof being made before William Pardon, Deputy Secretary of the Province. There follows the inventory and appraisement, the overseers being sworn before Robert Treat, Magistrate, November 17, 1671. Mary Roberts swears to the inventory, November 22, 1671, "before Robert Treat, by permission of the Governor."[2] In other words, Capt. Treat was authorized to act as deputy surrogate for the Governor, for this purpose.

The last will and testament of Matthew Campfield, of Newark, was witnessed by John Brown, senior, and Tho: Pierson, March 19, 1672-3, and on June 11, 1673, we find that "John Brown sen^r & tho Pierson sen^r wittnesses hereunto did make oath before me y^t this is the Last will & testament of Matthew Campfeild, his own handewriting," this proof being made before John Berry, Deputy Governor at the time. The inventory was sworn to before him the same day, and on June 30, 1673, he granted letters of administration to Sarah Campfield, the widow, sole executrix under the will.[3]

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[1] E. J. Deeds, Liber 3, pp. 45-46.

[2] Ibid., 49.

[3] Ibid., pp. 88-90.

Administration upon the estate of Obadiah Winter, late of Woodbridge, deceased, was granted by Gov. Carteret, April 19, 1675, to Margaret Winter alias Grabum, his wife, sole executrix under the testator's will, dated March 1st, 1674-5.[1]

The will of Martin Tichanor, of Newark, dated October 19, 1681, was proved by the oath of two witnesses, Ephraim Burwell and William Camp, who made oath before James Bollen, Justice, that "they were present as witnesses to the signing and sealing of this last will and testament of Martin Tichanor, deceased." Bollen was also Secretary of the Province of East Jersey, and so in close touch with the Governor, by whom he was doubtless authorized to take the proof of this will. Letters of administration were issued to John Tichanor, executor under the last will and testament of Martin Tichanor, his father, by Governor Philip Carteret, November 14, 1681.[2]

And the next day the Governor granted letters of administration on the estate of Jasper Crane, late of Newark, to John Crane, his son, executor.[3]

From the records of the probate of wills it appears very clearly that the county courts exercised jurisdiction in such matters quite frequently, particularly in West Jersey.

At a "Called Court," held July 5, 1679, for the Whorehill, on the Delaware, an order was made granting a quietus to an administration.[4]

A NEWARK RECORD OF SOME WILLS.

In the Newark Town Book—a miscellaneous record, chiefly of the division of the home lots among the first settlers, later conveyances, bills of sale, etc., 1689–1728—there are nine wills recorded, under the certificate of John Browne, town clerk, as to their correctness.

The first is that of Richard Lawrence, "belonging to the Towne of Newark in East Jersey," witnessed by John Ward

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[1] E. J. Wills. Liber 3, p. 111. It will be observed that Obadiah Winter's will bore date March 1, 1675. His bereaved widow proved the will and took out letters of administration on April 19, 1675. Eight days later the Governor issued a marriage license for William Taylor and Margaret Winter, alias Graybum, widow of Obadiah Winter. The "funeral baked meats" did scarce "*coldly* furnish forth the marriage tables," in this case.

[2] Ibid., 173. [3] Ibid., 174. [4] Salem Surveys, No. 2, f. 14.

and Steeuen Davis, and appended is the certificate of the proof of the instrument: "Witness sworn before me this 30th of March 1691. Thomas Johnson, Justice."[1]

The will of Joseph Riggs, "of Newark in the Government of New England," dated January 1, 1688–9, has this certificate of proof:

> "Appeared before vs, William Camp, John Browne, & Joseph Browne this 27 of November: 1689: and took oath that this is the Last will & testament of Joseph Riggs of Newark Latly deceased
>
> "JOHN WARD Justice
>
> "THOMAS JOHNSON Justice."[2]

This will was subsequently probated, in solemn form, May 16, 1711, and is filed at Trenton.[3] John Johnson and Samuell Camp were witnesses, besides the three named above.

The will of Michaill Tompkins, "of Newark in the Government of New England," had three witnesses. The proof reads thus:

> "Vpon the :4th: of December: 1690: appeared before us John Browne & took oath that according to the best of his knowledge this is the Last will of Michaill Tompkins senir Lately deceased
>
> "JOHN WARD Justice
>
> "THOMAS JOHNSON Justice."
>
> "Thomas Browne also took oath accordingly before me ye :5: december 1690
>
> "THOMAS JOHNSON Justice."[4]

John Baldwin, "of Newark in the Government of New England" made his will December 25, 1688. It was proved before a single Justice, thus:

> "Appeared before me John Curtis & John Browne this 28 of November 1689 & took oath that this is to the best of their knowledg the Last will & Testament of John Baldwin of Newark Lately Deceased
>
> "THOMAS JOHNSON Justice."[5]

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1 Newark Town Book, p. 10.
2 Ibid., p. 13.
3 E. J. Wills, Liber No. 1, p. 312.
4 Newark Town Book, p. 14.
5 Ibid., p. 11.

The following entry is interesting, as showing the simple and apparently entirely satisfactory method of getting an authoritative construction of a will:

"Whereas William Camp & Seth Tompkins overseers of the Last will of John Baldwin deceased, convinced[1] the Justices of Newark together (namely Mr John Ward, & Mr Thomas Johnson) to give their sence & Approbation of what might be most sutable to the settling of what Lands belong to the heire.

"Our sence is that the sd Lands spoken of in the sd will, willed to his daughter Hannah Tichenor, be settled vpon the son of John Baldwin Junir & the profits of the same fore the time to come, only the crop vpon the ground, Ebenezer Lindly is to take it off, without any molestation, this we give as our Apprehention this : 20th : of June : 1691 :

"John Ward Justice
"Thomas Johnson Justice."[2]

The will of David Ogden, "of Newark in the Province of East Jersey," dated December 26, 1691, was proved before Justices Ward and Johnson, February 27, 1691–2, by the oath of Samuell Harrison, "Mr Patrick ffalconar being deceased."[3]

The will of John Browne, of Newark, dated December 17, 1689, was proved December 4, 1690, by the oaths of John Browne, junior, and John Denison, before Justices Ward and Johnson.[4]

"The Last will and testement of mee Sarah Davis in hope of Eternal Life throw Jesus Christ my Lord," dated March 27, 1691, was proved May 16, 1691, by the oaths of Stephen Davis and Edward Ball, before Thomas Johnson, Justice.[5]

The will of Samuel Swaine, proved at New York, March 17, 1681–2, was recorded in the Newark Town Book, and immediately following is the inventory of the estate of Mrs. Joanna Swaine, deceased, his widow, December 15, 1694.[6] Her will, dated March 25, 1692, was proved December 10,

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1 convened.

2 Newark Town Book, p. 15.

3 Ibid., p. 16.

4 Ibid., p. 20.

5 Ibid., p. 33.

6 Ibid., p. 35.

1694, and filed and recorded at Perth Amboy,[1] but the inventory was recorded in the Newark Town Book.

FIRST NEW JERSEY LEGISLATION REGARDING WILLS.

The "Concessions and Agreements of the Proprietors, Freeholders and Inhabitants of the Province of West New Jersey, in America," dated March 3, 1676-7, contained among the common law or fundamental rights of that province careful provisions "for securing Estates of Persons that die, and taking care of Orphans," the first clause of which made this regulation regarding the probate of wills:

"If any person or persons die, the commissioners are to take care that the will of the deceased be duly performed, and security given by those that prove the will: And that all wills or testaments be registered in a public register appointed for that purpose, and the person and persons that prove the same, to bring in one true inventory under their hands of all the estate of the deceased, and to have a warrant under the hands of three commissioners, and the publick seal of the province, intimating that they have brought in an inventory of the estate, and given security. Then and not before, are they to dispose upon the estate."[2]

This was embodied in a statute passed at a session of the "General Free Assembly of the Province of West New Jersey, in America," held at Burlington, November 21–28, 1681, as follows:

"XI. That when any person or persons die, and have made a will and were in a capacity of so doing, the Governor, and commissioners, for the time being, are to take care that the will of the deceased be duly performed, and security given by him or them that prove the will; and that all wills and testaments, be registered in a publick register appointed for that purpose; and that the person or persons, who shall prove the same, shall bring in one true inventory, under the hands of two or more appraisers, of all the estate of the deceased, and shall have a warrant or license, under the hand of three justices

[1] E. J. Deeds, Liber E, p. 165. The original will is now in the office of the Secretary of State at Trenton.

[2] Leaming and Spicer, p. 403.

for the time being, under the publick seal of the province, intimating and declaring, that he or they have brought in an inventory of the estate, and given security for the true performance of the will, then and not before, he or they may enter upon and dispose of the estate."[1]

The East Jersey Assembly enacted March 21, 1682-3:

"XX. That all wills in writing, attested by two credible witnesses, shall be of the same force to convey lands, as other conveyance being registered in the Secretaries office within this Province, within forty days after the testator's death."[2]

An act of March 13, 1698-9, slightly modified this provision as follows:

"All wills in writing and attested by three or more credible witnesses shall be of the same force to convey lands as other conveyances, being proved and registered in the publick records, within sixty days after the testator's death. And in case of neglect the executor, or executors shall be liable to citation, and fined two shillings for each citation, and eighteen pence for each fine."[3]

JURISDICTION OF THE GOVERNOR AND COUNCIL.

It will be observed that the authority to take proofs of wills and inventories and appraisements was usually exercised by someone designated for the purpose by the Governor. In some cases, however, original jurisdiction was exercised by the Governor and Council, as the following extracts from their records will show:

March 3, 1682-3: "Lawrence Andress tendring the adm'istracon of James Bollens Estate appraism^{t} and sale might bee Entred in the Secretarys office. vpon view thereof

"1st It appears the Letters of adm'istracon bear date the 12th Day of September 1682.

"2. The appraisement the 27th March 1682.

"3 The sale of the Estate the 28th of September 1682 amounting to 93^{lb} 15^{s} 1^{d}—Lawrence Andress declared here

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[1] Leaming and Spicer, 430.

[2] Ibid., 236; N. J. Archives, XIII., 31.

[3] Leaming and Spicer, 371; N. J. Archives, XIII., 265.

in Councill that he was w^th^ the Governor Phillip Carterett in December last w^ch^ was after the Prprietors arivall here,[1] and then and not before the Governor sealed the letters of Admi'strac'on in Lawrence Andress presence and delivered them to him in company of Capt Vickers—

"Wee observe the sale of the Estate and disposition was some months before the Admi'strac'on granted

"Lawrence Andress Alledges hee never had any pr^t^ of the Estate or received or disposed any pr^t^ thereof

"Wee finde not that any bond was given for the due adm'istrac'on thereof w^ch^ is aledged in the Admi'strac'on to bee entred into the 12^th^ Sept 1682."[2]

March 5: "Agreed that Capt Vickers & other prsons who were of the late Governors Councill since the death of the late Secretary Cap^t^ Bullen and are here in towne may have notice to bee here in Councill att 3 A Clock this afternoone to Attend a Conference relateing to them w^th^ the house of Deputyes—"[3]

May 10, 1683: "Samuel Moore & Nathaniel ffitzrandolph making applicac'on here and requesting to have the Administrac'on of the Estate of Captn James Bollen who Dyed intestate granted to them as guardians to the Children of the said Captn Bollen, And Lawrence Andresse the late p^r^tended Admi'strator to the said Estate Declareing that he dus absolutely renounce all p^r^tence and Claime to the Admi'strac'on thereof, It is Therefore Ordered that Samuel Moore and Nathaniel ffitzrandolph bringing here the Children of the said Captn Bollen and they Chooseing them their guardians that their Admi'strac'on be granted by the Deputy Governor to the said Moore and ffitzrandolph dureing the minority of the said orphans according to the Due Course of Law, they bringing in here a perfect Inventory or appraism^t^ of the said Intestates Estate to be recorded."[4]

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[1] That is, after the transfer of the ownership and government of East Jersey from the Lords Proprietors, by whom Philip Carteret had been appointed Governor, to the Twelve Proprietors, and their taking possession of the territory and government.

[2] N. J. Archives, XIII., 11-12.

[3] Ibid., XIII., 14.

[4] Ibid., XIII., 50.

Feb. 29, 1683-4: "The petic'on of Jonas Wood of Eliz^{t} Towne setting forth that vpon the Death of D^{r} W^{m} Taylor the Deceased was indebted to him—That he and W^{m} Broadwell Entred into bond after Taylors Death to Admi'ster his Estate—but since no Admistrac'on granted—but that Broadwell notwthstanding Receives the effects of Taylors Estate but gives noe Accompt thereof to the petic^{r} and prayes Admi'strac'on—w^{ch} being read the petic'oner and Will. Broadwell came before the board—Broadwell Denyes hee has rec^{d} anything since Taylors Death—but by notes and orders from Taylor in his life tyme hee rec^{d} about 20^{s} and noe more—after hearing of both p^{r}tyes it's ordered that Admi'strac'on be granted to the petic^{r}.[1]

October 30, 1686: "James Scott (sonn of George Scott of Picklockey late of the Kingdom of Scotland Deceased) came before this Councill being a Minor and made choyse off m^{r} John Johnstone and m^{r} George Willox to bee his Guardians—who were admitted accordingly—They giveing in sufficient security to bee accomptable to the s^{d} James Scott when hee shall attaine to the age of one and Twenty yeares—"[2]

Abel Porter, jun., of Boston, having died on the voyage from Scotland to East Jersey, his widow obtained letters of administration, March 4, 1685-6, from the Court of Suffolk county, Mass., and on April 22 following was also granted similar letters by the Governor of East Jersey.[3]

When the will (dated 23d 9th mo. 1683) of Richard Leppincott, of Monmouth county, was offered for probate, Jan. 2, 1683-4, a special commission was appointed by the Governor to examine the widow, Abigail Lippincott, in reference to the instrument,[4] instead of having the matter adjudicated by a Deputy Surrogate, or by a Court.

The Governor frequently asserted his authority over the persons and estates of infants. When Hanse Harmensen, of Constaple's Point, Bergen county, by a codicil, dated Oct. 19, 1700, appointed guardians over his grandson, an order was

[1] Ibid., XIII., 123.

[2] Ibid., XIII., 170.

[3] E. J. Deeds, Liber A, ff. 305-307.

[4] Ibid., 329.

made by the Governor, Dec. 3, 1701, confirming the appointment.[1] On the same day he admitted two persons as guardians of George Darling, of Woodbridge.[2]

He exercised like power over insane persons, as when (February 15, 1692–3) he appointed the wife and daughter (and the husband of the latter) of Samuel Hooton as his guardians, the said Hooton being "rendred uncapable to act through a distemper of lunacy."[3]

PREROGATIVE JURISDICTION.

As the jurisdiction of the Governor of New Jersey and the Governors of East and West Jersey, respectively, extended over the whole of their several governments, their powers as Ordinary were sufficient for controlling the administration of estates within their domains, and a will, administration or guardianship, proved or granted by the Governor or a surrogate appointed by him was valid, without regard to where the goods lay.[4]

The prerogative of the Archbishop of Canterbury was occasionally called into requisition, as in the following instances:

The Rev. John Allen, the settled minister at Woodbridge, having died in the latter part of 1683, letters of administration were granted to his son John, by the Archbishop of Canterbury, April 15, 1685. The instrument, which is in Latin, describes the residence of the deceased as being "the Island of New Jersey."[5] The venerable prelate had a better knowledge of his prerogative than of the geography of America.

Edward Barker, of London, made his will, August 30, 1686, in which he named his father and his father-in-law, both of London, executors. He had debts due him in America, and on his death his executors obtained letters of administration, with will annexed, from the Archbishop of Canterbury.[6]

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[1] E. J. Deeds, Liber C, ff. 179-180.

[2] Ibid., 181.

[3] E. J. Deeds, Liber D, f. 372.

[4] See American Law Register, by William Griffith, Trenton, 1822. IV., pp. 1185-1186.

[5] N. J. Archives, XXI., 56, 78; XXIII., 9-10.

[6] N. J. Archives, XXI., 286.

Hugh Buchanan, of Bristol, England, mariner, married the widow Jeane Wilke, of the same place, to whom in 1688 was devised a large tract of land on Alloways creek, Salem county. Her husband died in Barbados, in the West Indies. She married again, Sept. 15, 1696, Benjamin Burgesse, at Bristol, and on October 15, 1697, she took out letters of administration from the Archbishop of Canterbury on the estate of her late husband in New Jersey.[1]

DEPUTY SURROGATES.

Instances have been cited showing that the proofs of wills and inventories were frequently made before persons authorized by the Governor to act in his absence.

Thomas Gordon was the first person duly appointed Surrogate for East Jersey, his commission being dated March 8, 1693-4. He was again appointed December 18, 1700. From an instrument dated July 31, 1694, it appears that his formal title was "commissioner for taking the probate of last wills." By that instrument he certified that a certain person had properly administered an estate.[2]

NUNCUPATIVE WILLS.

Notwithstanding the statute of 29 Chas. II., cap. 3, hereinbefore recited, requiring wills to be in writing, witnessed by three persons, nuncupative or spoken wills were admitted to probate in Colonial times, there being at least twenty-eight of such wills noted in the records. For some reason, not apparent on the surface, this form of will was more usual in West Jersey than in East Jersey. Of the twenty-eight wills mentioned, fifteen were in Salem county, four in Gloucester, three in Burlington, and one in Cape May—a total of twenty-three in West Jersey. Of the other five, two were in Middlesex, two in Monmouth and one in Essex. In point of time, they range from 1685 to 1724.

Naturally, these nuncupative wills were usually the dying declarations of the testators expressing their wishes as to the

[1] West Jersey Records, Liber B. p. 607; Salem Deeds, Liber B. p. 61; Salem Deeds, Liber No. 5, p. 177.

[2] E. J. Commissions, Liber C. 187, 329; N. J. Archives, XXI., 215.

disposition of their property. Generally, they were offered for probate within a few days. Sometimes the family did not wait for the death before taking the preliminary steps to administer upon the estate, as in the case of Caleb Carman, senior, of Burlington county, whose will was uttered August 5, 1693, attested before Joseph Houldin and Samuel Crowell, Justices, by affidavit of John Gervis and Caleb Carman, leaving all to his wife Elizabeth. His estate had been inventoried a month before, or on July 7. Letters of administration were granted to his widow, August 16.[1]

There was a singular confusion over the will of John Denn, of Allawayes Creek, who died at or before June 24, 1685, having "spoken" his will before George Deacon, Commissioner, that he gave his whole estate to his widow for life, with remainder to his children. Administration was granted to his widow, May 3, 1686, by five Justices, but on February 15 following three of the Justices entered a notice that these letters of administration were granted "thoroe the Mistake of William Wilkinson Clark to y^e s^d Court there being a Nuncupative Will proved. Therefore y^e s^d afores^d p^rceedings are null and voyd by judgm^t of Court."[2]

Two witnesses swore, June 1, 1689, that on May 4, 1689, they had heard Marcus Lawrence, of Putshack, Gloucester county, say that he had sent for John Taylor to write his will, but feeling that he should speedily die he asked his wife if she would stay with his children; she desiring to consult with her own son, he appointed three friends to manage his whole estate and divide it between his wife and two children.

Haunce Sheiahel, of Penn's Neck, Salem county, planter, chose, of all places, to "speak" his will at the wedding of Nicholas Philpot, before three witnesses, but it was not until May 12, 1692, that administration on his estate was granted and an inventory taken.[3]

The estate of Moses Huestis, of Amwelbury, Salem county, was inventoried 15th of 9th mo. (November), 1694; his will was spoken the next day.[4]

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[1] N. J. Archives. XXIII., 82.

[2] Salem Wills. Liber No. 2, pp. 20, 24.

[3] Salem Wills, Liber A. p. 75.

[4] Salem Wills. Liber A. p. 132.

Sometimes these spoken wills were proved by the oaths of two witnesses, but the nuncupative will of Andrew Howman, of Rapahaking, Gloucester, made September, 1700, was substantiated by the affidavits of five witnesses, who moreover declared that "ther might at Least a dozen more be procured."

The scrivener who took down the will of Christopher Wetherill, of Mansfield township, Burlington county, March 25, 1711, certifies that "The withIn written Wass Taken in Wrighting from the Testators mouth y^e^ Very Substance of all Deuise Butt Nott in forme," and the will was admitted to probate April 6, 1711.[1]

John Pentlen, of Monmouth county, uttered his will on June 23, 1719, and John McDowell swore that a few days and then again a few hours before his death Pentlen had said he wished Henry Ross and family to have what he left. His personal estate was inventoried the same day by Adam Hude and the said McDowell.[2]

"LETTERS TESTIMONIAL."

In a number of instances in the early records of wills it is stated that "letters testimonial" were issued. From the following, it would seem that the expression is used where letters of administration were granted with will annexed, although in this particular case the letters were issued to the executor named in the will. The meaning of the expression seems to be, that *letters* were issued to the executor or administrator as a *testimonial* (i. e., in testimony) of his authority to act.

"To all Christian people & others whatsoever to whom these our Letters Testimoniall shall come, or whom the premises shall or may Concerne The governor & proprietors of the province of East New Jersey send Greeting Now Know yee That the twelfth day of Aprill in the year of Our Lord One thousand six hundred Eighty and Eight The annexed last will & testament of Mary Mitchell late of Elizabethtown widdow deceased, was tendered proved & approved before us, And she the s^d^ Mary Mitchell having whilst she lived divers and sun-

[1] Liber No. 1 of Wills, p. 302.

[2] N. J. Archives, XXIII., 359.

dry goods & Chattels to be administered within the s[d] province, and the Right of disposeing & granting the administration thereof belonging unto us, Wee have & doe hereby committ the administratione of all & singular the goods Chattels Rights and Creditts of the s[d] deceased, unto Andrew Hamptone of Elizabethtowne afores[d] whole executor in the s[d] annexed last will & Testament named Truly & faithfully to administer of the same and a full Just & perfect account of all & singular the goods Chattels rights and Credits of the s[d] deceased to make and the same to exhibite into the secretary's office on or before the thirteenth day of Aprill which shall be in the year of our Lord One thousand six hundred Eighty & nyn. Given under the seale of the s[d] province the day & year first above written.

"AND. HAMILTON."[1] [Governor.]

Letters testimonial with will annexed were issued September 1, 1692, to the executrix of Major William Sandford, of New Barbados, deceased.[2] Many other cases could be cited.[3]

THE PROBATE OF WILLS IN THE PROVINCIAL ERA.

The memorial of the Proprietors of the Province of East New Jersey to the Lords of Trade in regard to the proposed surrender of the Government to the Crown suggested that among the rights and privileges that should be confirmed to the proprietors and planters respectively, in the event of the surrender, was the following:

"XI. That all Wills of Persons dying within East-Jersey, and Letters of Administration of Estates lying there, may be made and granted by the chief Judge of East-Jersey for the Time being, who is to reside there, and a Register thereof kept at Perth-Amboy."[4]

After the surrender of the government of East Jersey and

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[1] E. J. Deeds, Liber B. f. 355.

[2] E. J. Deeds. Liber D, ff. 279. 355.

[3] Ibid., ff. 91. 94, 115. 116. 226. 257, 262, 269. 272. 281. 283. 285, 336. 340, 352. Liber E. ff. 10, 21, 41, 42, 80. 82. 129. 139, 142-167, 176. 197. 199. 217, 220, 224, 230, 236, 266. 269. 271. 316. 411, 458. 460. Liber F, ff. 45. 47, 127, 284, 355, 401, 461. 531, 592. 618. 632. 653-659. Liber G, ff. 1-4, 21, 22, 279. These references are all to East Jersey records, usually kept by Scotch clerks. The expression was probably peculiar to the Scottish law.

[4] Learning and Spicer, p. 590; N. J. Archives, II., 296.

West Jersey to the Crown, and the appointment of Lord Cornbury as Governor, in his instructions, dated November 16, 1702, the probate of wills was expressly reserved to him as Governor and the commander-in-chief of the province for the time being. The precise language was this:

"75. And to the end the ecclesiastical jurisdiction of the said lord bishop of London, may take place in our said province so far as conveniently may be, we do think fit that you give all countenance and encouragement to the exercise of the same, excepting only the collating to benefices, granting licenses for marriages, and *probate of wills*, which we have reserved to you our governor and the commander in chief of our said province for the time being."[1]

Thus the Governor "was not only ordinary, but metropolitan of the province. He had no superior but the queen in council.[2] His court was called the prerogative court, an appellation applied in England to the archbishop's court. Nor had he any subordinates; his jurisdiction over these subjects was sole and exclusive. This constitution of the court continued till the revolution, and was adopted by the convention which framed the constitution of the state in seventeen hundred and seventy-six. For one hundred and forty years the governor or ordinary was the only judge of probate known to the constitution of New Jersey.

"But at an early day the provincial governors, for their own and the people's convenience, appointed deputies, with the name of surrogates, residing in different parts of the province, to act in their stead, upon such cases as the people chose to submit to them. Sometimes there were more than one in a county, sometimes only one for two or three counties. They

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[1] Leaming and Spicer, 369; N. J. Archives, II., 529.

[2] "Until the revolution this power continued in and was exercised by the governor. No appeal was ever given from the governor's testamentary proceedings, except an appeal which existed from the highest colonial courts to the king in council." See Anthony v. Anthony, Court of Errors and Appeals, 1846, 5 N. J. Eq. (1 Halst. Ch.), 627; citing Griffith's Law Reg., 1178, 1179, 1185.

"It is admitted, and is indisputable, that from the surrender of the proprietary government to Queen Anne, in 1702, to the present time, neither this court nor its provincial prototype, has ever claimed any supervision over the decrees of the prerogative court." Beasley, Ch. J., in Harris v. Vanderveer's Ex'r., Court of Errors and Appeals, 1869, 21 N. J. Eq. (6 C. E. Gr.), 426.

were mere deputies, subject to the control and supervision of the ordinary, and to be removed at his pleasure. By appointing them the ordinary did not in the least curtail his own jurisdiction. Whilst he held appellate jurisdiction of their acts, his own original jurisdiction remained entire.

"These surrogates did not hold to the ordinary the relation which the English ordinaries hold to their metropolitan. The English ordinary has exclusive jurisdiction where the goods of the deceased are all situated in his diocese; and the metropolitan has exclusive jurisdiction where notable goods are situated in two or more dioceses. No relation of this kind subsisted between the ordinary and surrogates of New Jersey. The ordinary retained jurisdiction of all cases. The surrogate, acting as his deputy, had also jurisdiction of all cases submitted to him, unless some special restriction were inserted in his commission. New Jersey was never subdivided into dioceses. The doctrine of bona notabilia had never any place here.

"The power of the ordinary to appoint these officers, seems never to have been questioned. Their acts were recognized by the courts, and they came to be considered as lawful and competent judges of the matters submitted to their cognizance."[1]

Governor Cornbury arrived in New York, May 3, 1702, to assume the government of that Province. His commission as Governor of New Jersey, dated December 5, 1702, did not reach him until July 29, 1703, and on August 10, 1703, he proceeded to his new government, and published his commission at Perth Amboy on the 11th, and at Burlington on the 13th.[2] He took the proofs of wills personally, in New York, in some cases of New Jersey wills, by the oaths of one or more of the subscribing witnesses. In other cases he granted letters of administration on the certificate of two justices that the wills had

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[1] William Pennington, Ordinary, in the matter of Abraham Coursen's Will, in the Prerogative Court, April Term, 1843. 4 N. J. Equity Reports (3 Gr. Ch.), 412-413.

"The jurisdiction of the governor as the ordinary of New Jersey, before the revolution and since, extended throughout the state, and a will, administration or guardianship proved or granted by himself or a surrogate, (and he appointed as many as he chose to do,) was valid, without regard to the place where the goods lay. Hence he possessed the prerogative powers of the ecclesiastical jurisdiction, in these particulars."—4 Griffith's Law Reg., 1185-6.

[2] N. Y. Col. Docs., IV., 955: N. J. Archives, II., 489, 513; III., I.

been proved before them. About September, 1702, he appointed Dr. John Bridges, of New York, to act as his surrogate in taking the proofs of wills, inventories, etc.[1] Some time after, or on February 28, 1703-4, he appointed a surrogate to act for him "to administer oaths to persons suing out letters of administration," etc., in New Jersey, his choice for the office being Thomas Revell,[2] a favorite of his Lordship then and afterwards, and living at Burlington, where he kept the Secretary's office of the Province, being also Register of the West Jersey Proprietors. He instituted the system of keeping the records of wills, administrations and guardianships in books provided exclusively for those purposes. Although the two Divisions or Provinces of East Jersey and West Jersey were now united into a single Province, under one Governor, the precedent followed for twenty years or more was not easily to be disregarded, and as the land records of the two Divisions were still kept in separate offices—at Burlington and Perth Amboy—so separate sets of books were provided for the records of wills, etc., those for East Jersey being numbered, while letters were used to designate those for West Jersey. The first record of the probate of a will in New Jersey under Lord Cornbury is found in East Jersey Wills, Liber No. 1, page 1, in the office of the Secretary of State, whither the records of conveyances and wills, in the Proprietors' offices at Burlington and Perth Amboy, were transferred when the State capital was finally located at Trenton, in 1790. This interesting probate record is as follows:

"Edward Vicount Cornbury Captain Generall and Gouvernor in Chief, in and over ye Province of Nova Cesarea New Yorke.

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1 John Bridges exhibited the inventory of the estate of Judah Samuel, of New York, September 2, 1702. The will of William Giles was proved before John Bridges, Doctor of Laws, September 16, 1702. The will of John Symkam was proved before Lord Cornbury in New York, February 21, 1702-3. By order of the Queen, August 8, 1702, Governor Cornbury appointed Bridges to the office of Chief Justice of New York, in April, 1703. The will of Nathaniel Pearsall, a Quaker, was proved before John Bridges, Secretary, March 3, 1703-4. In a letter of November 6, 1704, Lord Cornbury mentions the death of Dr. Bridges. Nowhere is he designated as surrogate, but he evidently acted as such for the Governor.—*N. Y. Col. Docs.*, IV., 1142; V., 135; *New York County Wills*, in New York Historical Society's Collections, XXV. (1892), 310, 311, 317, 332 335.

2 N. Y. Hist. MSS., II., 322; N. J. Archives, III., 290.

"To all to whome these presents come or may concerne Greting—Know yee that at Burlington in y^e^ province aforesaid the seaventh day of March y^e^ Last will and[1] of Andrew Smith was proved aproved and allowed of by me having whilst he lived and at y^e^ time of his Death Goods Chattles and Credits in divers places Within this province by meanes Whereof the full disposition of all and Singular y^e^ Goods Chattles and Credits and the Granteing the Administrasion of them Also the hearing of Accots Calculation or Recking and the finall Discharge and Disinition[2] of the sam^e^ unto me Solely and not unto any other Inferior Judge and[3] manifestly Known to belong and Ye admision of all and Singular the Goods Chattles and Credits of the said deceased Andrew Smith, and his Said last will and Testament in any manner of wayes concerning Is Granted unto Thomas Smith and Elizabeth Smith Executors of y^e^ said Last. Will and Testament of the said Andrew Smith named Chiefly of Well and duely Administring y^e^ same and of makeing a true and perfect inventory of all and singular the said Goods, Chattles and Credits and Exhibiting y^e^ same into y^e^ Secretaries office of y^e^ said Province at or before the first day of Aprill next ensueing and of Rendering a Just and true accot Calculation or Reckning when thereunto he shall bee Lawfully Required.

"In Testimony Whereof I Thomas Revell Esq^r^. Surrogat Commissionated and appointed by y^e^ said Lord Cornbury have hereunto set my hand and Seale this Eight day of March 1703–4. Annoq, Reg. Regn. Anna Secund.

"Entered in y^e^ office by

"J. Bass S. & Reg."

INCONVENIENCES IN PROBATING WILLS.

In a remonstrance of the Assembly of New Jersey to Lord Cornbury, May 5, 1707, among the evils enumerated by them as existing in the administration was this:

"The only Office for Probate of Wills being in Burlington, it must be very expensive and inconvenient for Persons, who live remote, especially for the whole Eastern Division.

[1] [testament] [2] Query: Distribution. [3] are

We therefore pray the Governour to assent to an Act to settle such an Office in every County or at least in each Division of this Province, and that the Officers may be men of Good Estates and known Integrity in the said County or Division."[1]

Lord Cornbury replied at great length, May 12, 1707, to the bitter attacks of the Assembly, and on the subject of the probate office had this to say:

"The office of Probate of wills, is wherever the Governor is, Consequently not at Burlington only, Ever Since the Queen has done me the honour to Entrust me with the Government of this province I have never failed of being in the Province twice every year, once at Burlington and once at Amboy. . . . . I was twise in Amboy last yeare, where anybody that had a Will to prove, might have had it done if they had pleased. Besides my being twice every year in the Province Considering the Remoteness of Cape May County and the County of Salem, I did appoint a Surrogate at Burlington[2] before whome any of the Inhabitants of Either Division might have had their Wills proved, I did not think it Necessary to appoint one in the Eastern Division, because the Inhabitants of that Division who are most Remote from New Yorke are within a very easy days Journey of my Surrogate at Burlington, and much the Major part of the people of that Division are within a small day's Journey of New Yorke, where their private affairs dayly calls many of them, and where any of them may have their wills proved without any Injury to or Incroachment upon their Properties, Rights or privileges.[3]

The House retorted in this vein, on October 29, 1707:

"We thought the only office for probate of Wills was at Burlington, but your Excellcy has Convinct us that it is wherever your Excell^{y} is, and Consequently may be at Yorke, Albany, the East end Long Island, or in Connecticut or New England, or any place more remote Should your Excellency business or Inclination call you there which is So farr from

[1] N. J. Archives, III., p. 175; Journals and Votes of the House of Representatives of New Jersey, 1703-1710. Jersey City, 1872. p. 100.

[2] Thomas Revell.

[3] Journals and Votes of the House of Representatives of New Jersey, ut supra, p. 112; N. J. Archives, III., 183.

Making it less a grievance that it Makes it more So, and notwithstanding those Soft, Cool and Considerate termes of Malicious Scandalous and frivolous with which your Excellecy Vouchsafes to treat the assembly of this Province they are of opinion that no Judicious or Impartiall men will think it reasonable that the Inhabitants of one Province Should goe into another to have their Wills proved, and take letters of Administration at fort Anne from the Govenr of New Yorke, for what Should Regularly be done by the Governour of New Jersey in Jersey, to which place all the acts of Government relating to New Jersey are limited by the Queen's Letters pattent under the great Seale of England, and when your Excellency is absent from new Jersey to be Executed by the Lieutenant govr, and by the sd letters Pattents Not the least collour of authority is given to your Excellency, to doe any act of Government relating to New Jersey, anywhere but in Jersey, Nor is there any Instructions (that we know of) Contradicting the said Letters Pattents, anywhere upon Record in this province, to warrant your Excellency's Conduct in that affaire.

"If this be not Cause and just cause of Complaint we doe not know what is, we are inclined to believe the Province of New Yorke, would think it Soe were they to come to Amboy or Burlington to prove wills, &c.

"We doe not think that what we desire is an Invation of the Queen's Right, but what her Majesty without Infringement of her Prerogative Royall may assent to, and their late Majesty's of blessed Memory did by their Governour Coll Fletcher assent to an Act made in New Yorke in the yeare 1692 Entitled an act for the Supervising of Intestate Estates, and Regulating the Probate of Wills, and granting Letters of administration[1] by which the Court of Common pleas in the

[1] "By an act passed November 11, 1692, the granting of probate of wills and administrations is expressly vested in the Governor or his delegate under the prerogative seal. . . . At the passing of the Act of 1692, the Goveenor appointed a surrogate or deputy for the business of the prerogative court and since that period a constant succession of surrogates have been commissioned by the Governors under the prerogative seal, yet performed the prerogative court business in the same place where the Secretary held and excercised his office."—*N. Y. Col. Docs.*, VII., 324. The bill was introduced April 28, 1691, and passed by the House May 2, but was not passed until November 14, 1692.—*Journal of the General Assembly of New York*, New York, 1764, I., 9, 21, 28. "The powers relative to probate of

Remote Counties of that Province was Impowered to Take the Examination of witnesses to any Will within their Respective Counties and certifie the same to the Secretary's office and the Judges of the Severall Courts in those Remote County's Impowrd to Grant probates of any will or Letters of administration to any person or persons, where the Estate did not exceed 50£, what has bin done there may with as much reason be done here without Sacrificing the Queen's Prerogative Royall, to the humours or Capricioes of any person or persons whatsoever."[1]

The Governor and the Assembly were at swords' points on this and every other matter of administration, and nothing came of this demand for better probate facilities in the Province, during his time.

When Lord Lovelace was appointed Governor of the Province to succeed Lord Cornbury, the Lords of Trade, in sending him her Majesty's instructions, on June 28, 1708, referred to this complaint of the New Jersey Assembly, commenting favorably upon the remonstrance, in the following language:

"'Tis true that the probate of Wills and Granting of Letters of Administration, is by Her Majesty, entrusted with the Governor; Yet we do not see that the settling such an office in each Division in New Jersey, as proposed by the Remonstrance for the Ease of Her Majesty's Subjects there will be a lessning of the Rights of Prerogative, or of the Governor."[2]

Lord Lovelace lived too short a time to carry out the proposed reform, but his successor, Colonel Robert Hunter, acceded to the wishes of the people.[3] After the custom of the day, the Grand Jury for the Counties of Middlesex and Somerset, at the sessions held at Perth Amboy, the fourth Tuesday in May, 1712, adopted an address to the Governor, commending his administration for several of his acts, among them:

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last wills and testaments, and the granting of letters of administration on intestate estates, are committed to the Governor, who acts ordinarily by a delegate."—*Smith's Hist. N. Y.*, New York, 1829, I., 377.

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[1] Journals and Votes of the House of Representatives of New Jersey, ut supra, pp. 134-135; N. J. Archives, III., 247.

[2] N. J. Archives, III., p. 327.

[3] Governor Hunter's instructions were precisely the same as Cornbury's, relative to the probate of wills.

"Your Excellency Appointing Surrogates in remote parts of the Province, which gives a general ease to the Country, in preventing that great trouble and excessive charge to which many were formerly exposed in Travelling from the most distant Places of the Province to Burlington, for Probate of Wills, Letters of Administration and Licenses of Marriages."[1]

SURROGATES IN THE PROVINCIAL TIMES.

Some of the surrogates, etc., appointed by the Governors during the Provincial era, and the dates of their appointment, were as follows:

Thomas Gordon, February 14, 1710–11.

Michael Kearny, surrogate of New Jersey, Oct. 24, 1720.

Thomas Smith, surrogate of West Jersey, July 17, 1722.

Samuel Bustill, deputy surrogate for West Jersey, August 22, 1722; surrogate for West Jersey, March 1, 1732–3.

John Rolfe, deputy surrogate, Cape May and Salem counties, September 11, 1722.

John Reading, surrogate for Hunterdon county, Aug. 18, 1727.

Lawrence Smith, surrogate for Monmouth county, August 18, 1727.

Joseph Rose, of Burlington, surrogate for West Jersey, October 13, 1735.

Charles Read, surrogate of the prerogative court, November 8, 1744; July 1, 1746; September 18, 1747; register of the prerogative court, December 25, 1759; surrogate of the prerogative court, March 22, 1762.

Jacob Dennis, surrogate, prerogative court, Monmouth county, April 16, 1748.

Jeremiah Condy Russell, surrogate, Sussex and Morris counties, November 26, 1753.

Aaron Doud, surrogate, Sussex county, March —, 1759.

James Hude, surrogate East Jersey, March 22, 1762; surrogate, prerogative court, East Jersey, Nov. 19, 1767; surrogate, Somerset county, 1768; surrogate, East Jersey, October 30, 1770.

[1] N. J. Archives, XI., 31.

Micajah How, surrogate, prerogative court, August 5, 1763; surrogate, Hunterdon county, 1768.

John Reid, surrogate, prerogative court, August 5, 1763.

Robert Burchan, surrogate, prerogative court of New Jersey, July 17, 1765; surrogate, Burlington county, 1768.

Maurice Morgan, surrogate of the Province, July 15, 1767.

Bowes Reed, surrogate, Hunterdon county, 1767.

John Zabriskie, surrogate, Bergen county, November 19, 1767, and in 1768.

Charles Pettit, surrogate of the Province, November 19, 1767; surrogate and register, October 27, 1769; surrogate general of New Jersey, October 28, 1769.

John Ladd, surrogate, Gloucester county, 1767.

Maskell Ewing, surrogate, Cumberland county, 1767.

Elijah Hughes, Cape May, surrogate, prerogative court, April 17, 1767; surrogate, Cape May county, 1767.

Richard Kemble, surrogate, Morris county, 1768.

David Brearley, surrogate, Monmouth county, 1768; surrogate, March 13, 1771.

John Lefferty, surrogate, Somerset county, 1768.

William Taylor, surrogate, Hunterdon county, Nov. 26, 1768.

William Paterson, surrogate for the Province, Aug. 2, 1769.

George Reading, surrogate, Hunterdon county, Sept. 21, 1771.

Hugh Hughes, surrogate, Sussex county, Sept. 21, 1771.

John Carey, of Salem, surrogate, August 8, 1774.

John Thomson, of Perth Amboy, Oct. 22, 1774.

James Kirkpatrick, surrogate, East Jersey, Dec. 19, 1774.

Daniel Isaac Browne, surrogate, East Jersey, Dec. 20, 1774.

A commission was issued by Governor Josiah Hardy, March 22, 1762, to Charles Read, Samuel Allinson and Gabriel Blond, of the City of Burlington, John Ladd of the County of Gloucester, George Trenchard of the County of Salem, Maskell Ewing of the County of Cumberland, Henry Young of the County of Cape May, Theophilus Severns of

the County of Hunterdon, and Aaron Doud of the County of Sussex, to be surrogates of the Prerogative Court in the Western Division of the Province of New Jersey, each of them to have all powers and authorities to the said office belonging, and to hold the same during the will and pleasure of the Governor.

A similar commission was granted by him the same day to Charles Read, John Smyth and Jonathan Doane, of the City of Perth Amboy, Anthony White and James Hude, Junr., of the City of New Brunswick, Robert Ogden of Elizabeth Town, Uzal Ogden and Lewis Ogden of Newark, John Sobrisco (Zabriskie) of the County of Bergen, Jacob Dennis and Samuel Leonard of the County of Monmouth, appointing them and each of them surrogates of the Prerogative Court in the Eastern Division of the Province of New Jersey, to hold the same during his will and pleasure.[1]

ROYAL ENCROACHMENT ON THE GOVERNOR'S PRERCGATIVE.

Although by the instructions given from time to time to the several Governors of New Jersey they were vested with full power in the matter of the probate of wills, etc., and by virtue of that power had been in the habit of appointing their own surrogates, an important departure from this practice occurred when Maurice Morgann was granted a patent by the King, under the Great Seal of Great Britain, bearing date at Westminster, June 18, 1767, for the offices of "Secretary, Clerk of the Council, Clerk of the Supreme Court, Clerk of the Pleas, Surrogate and keeper and register of records, in the Colony of Nova Cæsarea or New Jersey in America," to have, hold, exercise and enjoy the said offices unto him by himself or his sufficient deputy or deputies, for whom he should be answerable, during the royal pleasure. Morgann was evidently the protege of some court favorite. He resided in Parliament street, Westminster, London, and not being disposed to relinquish the pleasures of London life, he appointed Joseph Reed, Jr., (afterwards Washington's Adjutant-General) to be his deputy in said offices during the pleasure of the said Mor-

[1] N. J. Archives. IX., 359-360.

gann.[1] This instrument bears date June 27, 1767. Reed qualified October 10, 1767, before Charles Read, one of the Justices of the Supreme Court of New Jersey.[2] This seems a little singular in view of the fact that Charles Read at this time held the office of Register of the Prerogative Court, by appointment of Governor Franklin.

At a meeting of the Governor and his Council, of whom Charles Read was one, at Burlington, November 13, 1767, Joseph Reed produced an exemplification of the commission of Maurice Morgann as Clerk of the Council, and the instrument under the hand and seal of the said Maurice Morgann appointing Reed as Deputy, and qualified and was admitted as Deputy Clerk. The Governor then acquainted the Council that Reed had made a claim, as Deputy Secretary and Register of the Province, for the seals and records of the Prerogative Court, and had requested the Governor as Judge of the said court to deliver them to him; that a claim of the said office of Register of the Prerogative Court was also made by Charles Read, and as the welfare and interest of the province greatly depended upon the due regulation of the said court and its offices, his Excellency prayed the advice of the Council thereon. The next day the Governor stated that Charles Read had agreed that if an order under the seal of the Prerogative Court was produced to him, he would deliver up the records of the Prerogative Court to the person therein appointed to receive them, saving to himself the right of further prosecuting his claim if he should think it expedient. The Council thereupon thought it unnecessary to consider farther the merits of the claims, but advised the Governor to issue such order and to transact the business of the Court with the said Joseph Reed in the usual and accustomed manner.[3]

The Governor naturally disliking to provoke a controversy with the royal appointing power complacently issued a commission to Joseph Reed, November 19, 1767, in which, after referring to the royal letters patent, he added: "Whereas,

[1] Joseph Reed, junior, studied law in the Middle Temple, London, from December, 1763, until the spring of 1765.—*Reed's Reed*, I., 23. It was probably through friendships formed there and then that he secured this appointment.

[2] N. J. Archives, X., 1-7.

[3] N. J. Archives, XVII., 457-8.

Executors and Administrators, and their Accounts to State, Examine and Approve, allow and discharge and Quietus Est thereupon to give and grant, and generally to do execute and perform all such Acts and things as to the said Office of Surrogate" did belong and appertain, so long as he should continue as such deputy under the said Maurice Morgann under the appointment aforesaid, saving and reserving nevertheless as Ordinary of the said Province "all Judicial power in Controverted Cases, according to the Usage and Custom of the said Province."[1]

This act of the King, in appointing to so important an office a person who never intended to administer its duties in person, but only by a deputy, while he reaped the emoluments and spent them three thousand miles away, following so closely after the Stamp Act, was another of those irksome exercises of authority that made more restive an already dissatisfied people.

SOME PROVINCIAL ACTS.

Among the very few acts passed by the Legislature, before the Revolution, having any relation to the administration of estates, was the following, passed March 17, 1713–14:

An act confirming Letters of Administration, granted, and to be granted within this Province.

SECT. 1. Whereas Her Sacred Majesty hath reserved to her respective Governors or Commanders in Chief of this her Colony of New-Jersey, the Collating to Benefices, granting Licenses for Marriages, Probates of Wills, and granting Letters of Administration,

2. BE IT THEREFORE ENACTED, etc., That all Letters of Administration that heretofore have been granted by the pres-

[1] N. J. Archives, X., pp 8-10. Two years later, or on October 27, 1769, Morgann, being then in New Jersey, appointed Charles Pettit, who was a deputy under Reed, to succeed the latter as his deputy in the offices of Secretary of the Province, Clerk of the Council, Clerk of the Supreme Court, Clerk of the Pleas, Surrogate and Keeper and Register of the Records of the Province, etc.; revoking, at the same time, the previous appointment of Reed.—*N. J. Archives*, X., 132. It is probable that Reed's personal affairs and his law practice now demanded all his time, and that the appointment of his successor was made at his request, Mr. Pettit having married his half-sister.—*Reed's Reed*, I., 40. No other mention of Mr. Morgann has been found in the records.

ent or any preceding Governor or Commander in Chief, or by any other Person or Persons that heretofore have been empowered to grant the same, or that hereafter shall be granted within this Colony by the present or any succeeding Governor or Commander in Chief, or by any Person or Persons empowered by him or them, all such Letters of Administration heretofore granted, or hereafter to be granted by the Authority aforesaid, shall only be, and are hereby declared to be, and at all Times hereafter shall be taken, deemed and esteemed to be good and valid in the Law, to all Intents and Purposes, according to the true Intent and Design of them, and every of them respectively, and shall not be Superseded or Reversed by any other Administration whatsoever, granted, or to be granted, for Estates within this Colony, excepting by such Administration as shall be granted by the Authority aforesaid.[1]

"An Act for the speedy recovery of legacies," etc., passed July 8, 1730, provided that legatees might sue or prosecute an action of debt or detinue for such legacy, after it should become due; if it amounted to the value of twenty pounds or upwards, in the Supreme Court of the province or any other court of record; if upwards of forty shillings and under twenty pounds, in any of the courts of common pleas; if of the value of forty shillings or under, before any justice of the peace. The respective courts where said actions might be commenced, upon the plea of want of assets to pay all the debts of the legacies, were directed to appoint auditors to examine the accounts of the executors, who, after full hearing, with due notice to all parties, should procure the auditors aforesaid to report how the accounts of the executors stood, and the court was then authorized to award execution upon the judgment to be had in the suit for the proportion of assets that ought to go towards paying the legacies; and the court was also authorized to correct and amend any mistakes or errors that might happen in the accounts so reported. Provision was likewise made for a reasonable demand to be first made of the executor or executors before any such suit could be maintained, and also for giving to the executors a refunding bond. The act

[1] Nevill's Laws, I., 29-30; N. J. Archives, XIII., 552; Allinson's Laws, 26.

was to remain in force for a limited time, before the expiration of which it was continued forever, by another act passed March 15, 1738-9.[1]

This act was repealed and replaced by "An Act for the more speedy Recovery of Legacies in this Province, and for affirming such Acts of Administrators bona Fide done before Notice of a Will," passed March 11, 1774. This authorized suits for legacies amounting to the value of £15 or upwards to be brought in the Supreme Court, or any other court of record, and made some other slight changes in the previous statute.[2] The act was further slightly modified in the revision of March 27, 1874.[3]

FEES OF THE PREROGATIVE OFFICE.

Soon after Lord Cornbury's accession as Governor of New Jersey he, with the advice of his Council, drew up and published "An Ordinance for Establishing Courts of Judicature."[4] The resolution of the Council for establishing the Courts mentioned in the Ordinance was adopted August 18, 1703.[5] The Ordinance was printed by William Bradford, at New York, in 1704, making four pages folio.[6]

In this connection, Lord Cornbury also prescribed the fees for services rendered in the several Courts, and these were published at the same time by William Bradford, in a separate pamphlet of four pages folio, entitled: "A Catalogue of Fees established By the Governour & Council for the Province of New-Jarsey."[6] The fees of the Prerogative Court were as follows:

THE SECRETARY'S FEES.

	£.	S.	D.
For Recording a Will, Inventory, &c., under 24 lines, - - - - -	00	03	00
For every Sheet more, - - -	00	00	09

[1] Nevill's Laws, I., 192-252; N. J. Archives, XIV., 438; XV., 79.

[2] Allinson's Laws, 442; Paterson, 36; Rev. Laws (1821), 59; Rev. St. (1846), 358.

[3] Gen. St., 1938.

[4] Printed in full in Field's Provincial Courts of New Jersey, New York, 1849, pp. 256-262.

[5] N. J. Archives, XIII., 303; III., 4.

[6] Copy in the State Library at Trenton.

	£.	S.	D.
For every Letter of Administration of 100 *l.* or under, - - - - - -	00	06	00
For the certificate of a Probate of a Will, -	00	04	00
For a *Quietus* on an Administration, - -	0	6	0

This Ordinance was reprinted in 1714,[1] in connection with "An Act Enforcing the Observation of the Ordinance for establishing Fees within this Province," passed March 17, 1713–14, and subsequently disallowed by the King, January 20, 1721–2.[2]

A new "Ordinance for Regulating & Establishing Fees Within this his Majesty's Province of New Jersey," was passed by Governor William Burnet, November 26, 1723, and was printed by William Bradford, at New York, in 1724, in a pamphlet of fourteen folio pages.[1] Another Ordinance on the same subject was published in 1727.[1] The first Act of the Legislature establishing fees was passed December 2, 1743, but failed to receive the royal approval.[3]

The following fees were allowed by an act passed Februruary 17, 1747-8, and confirmed by the King in Council, November 23, 1749:

Engrossing a Will and Probate, to be done in Parchment, for each Sheet containing fifteen Lines and six Words in a Line, ten pence per Sheet.

Taking Depositions to a Will, and Recording the Will, each Sheet containing fifteen Lines, and six Words to a Line, seven pence per Sheet.

Swearing or Attesting the Witnesses and Executors, for each nine pence.

Drawing every Fiat, or Order for Administration, and for Swearing or Attesting the Administrators, three shillings.

Engrossing the Letters of Administration, each Sheet containing fifteen Lines, and six Words to a Line, ten pence per Sheet.

Recording the same per Sheet, seven pence.

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[1] Copy in the State Library at Trenton.

[2] N. J. Archives, XIII., 552; XIV., 249; IV., 221.

[3] N. J. Archives, XV., 311; VI., 238-241.

BY HIS EXCELLENCY,

LEWIS MORRIS, *Esq*; *Captain-General and Governor in Chief in and over His Majesty's Province of* New-Jersey, *and Territories thereon depending in* America, *and Vice-Admiral in the same*, &c.

To all to whom these Presents shall come, GREETING.

KNOW Ye that at

the last Will and Testament of
deceased, was proved before who was thereunto duly authorized and appointed for that Purpose, and is now approved and allowed of by Me; he the said Deceased, having while he lived, and at the Time of h Death, Goods, Rights and Credits in divers Places within this Province, by means whereof the full Disposition of all and singular the Goods, Rights and Credits of the said Deceased, and the Granting Administration of them, also the Hearing of Account, Calculation or Reckoning, and the final Discharge and Dismission from the same, unto Me solely, and not unto any other inferior Judge, are manifestly known to belong, And the Administration of all and singular the Goods, Rights and Credits of the said Deceased, and h last Will and Testament in any Manner of Way concerning was granted unto

in the said Testament named, chiefly of well and truly performing the said Will, and of making a true and perfect Inventory of all and singular the Goods, Rights and Credits of the said Deceased, and exhibiting the same into the Registry of the Prerogative Court in the Secretary's Office at
and of rendering a just and true Accompt, when thereunto lawfully required, being

In Testimony whereof, I have caused the
Prerogative Seal of the said Province to be affixed, at in the Year of our
Lord, One Thousand Seven Hundred and Forty

Drawing the Administration Bond, two shillings and six pence.

Filing the Original Will, nine pence.

Recording the Inventory per Sheet, each Sheet containing fifteen Lines, and six Words to a Line, seven pence.

Filing the Inventory and Swearing the Executor, eighteen pence.

Every Quietus per Sheet as aforesaid, seven pence.

Recording the same per Sheet as aforesaid, one shilling.

Auditing all the Accounts of Administrators and Executors, one shilling.

Drawing and setting up Notice in order to their passing their Accounts, one shilling.[1]

WILLS AS CONVEYANCES OF LANDS.

Mention has been made (p. 38, ante) of acts passed in 1683 and 1699, providing that wills in writing, duly witnessed, and registered in the public records, should be of the same force to convey lands as other conveyances. To the same end was this more elaborate act passed March 17, 1713-14:

"An Act for confirming of Conveyances of lands made and to be made by Wills and Powers of Attorney, and declaring what Exemplifications of Records and other Things shall be holden and received for good Evidence of Estates of Inheritance, and for Transfering of Uses into possession.

"Sect. 1. Whereas on and several Years after the first Settlement of this Colony, the great distance of Plantations, and scarcity of Inhabitants was such, that it was difficult to get more than two Witnesses to be present at the Signing, Sealing and Acknowledging of Last Wills and Testaments, which induced the then Legislature of the Province of East-Jersey, now the Eastern-Division of this Province, in the Year One Thousand Six Hundred and Eighty Two, to make a Law declaring, that all Wills in Writing, attested by two credible Witnesses, shall be of the same force to convey lands as other Conveyances.

"And whereas Pursuant to the said Law, many Wills have

[1] Nevill's Laws, I., 311; N. J. Archives, XV., 611-18, 672; Allinson's Laws, 162.

been made, Bequeathing and Devising Lands, signed by the Testator, and attested only by two subscribing Witnesses.

"2. *Be it therefore Enacted* by the Governor, Council and General Assembly, and by the Authority of the same, That all last Wills and Testaments heretofore made in Writing, signed by the Testator, In Presence of two subscribing Witnesses, and proved according to the Custom heretofore used in either the Eastern or Western-Divisions of this Province, by which any Lands, Tenements or Hereditaments have been given, devised or bequeathed unto any Person or Persons whatsoever, every of the said last Wills and Testaments shall, at all times hereafter, be held, taken, deemed and esteemed as good, valid and sufficient Title in the Law, to all Intents, Constructions and Purposes, as if the Testator had conveyed the same away in his Life-Time, and shall forever bar any Person or Persons claiming or to claim Estate under any such Testator, contrary to the true Intent and Meaning of such Will and Testament; and the said Will being proved as aforesaid, and the Books of Registers of either of the Eastern or Western-Divisions of this Province in which they were entered, being proved as aforesaid, may be given, and shall be received in Evidence, any Law or Custom to the contrary notwithstanding.

"3. *And be it Enacted by the authority aforesaid*, That all Wills and Testaments which hereafter shall be made in some doubts have arisen on the said Appointment and on the Power of the said Maurice Morgann to make a Deputy as to the Office of Surrogate: In order therefore That His Majesty's Gracious Intentions in the said Patent expressed may have full Effect within this Colony and the deputation of the said Maurice Morgann Esq. may not in respect to the Surrogate's Office, be disputed," he therefore appointed said Reed to be provincial and principal Surrogate of the Province of New Jersey, and disallowed and made void all former commissions theretofore granted to surrogates in said province, giving him full power and authority in the stead and place of the Governor, "to swear or Affirm the witnesses to Last Wills and Testaments, to Admit Administrations on the Estates of Persons dying Intestate, and to Administer the Oaths or Affirmations to

Writing, signed and published by the Testator, in presence of three subscribing Witnesses,[1] and regularly proved and entered upon the Books of Records or Registers in the Secretary's Office of this Province, or any proper Office for that Purpose, shall and are hereby declared, and forever hereafter shall be taken, accepted, deemed and esteemed sufficient to devise, bequeath and convey any Lands, Tenements, Hereditaments, or other Estates whatsoever, within this Province, as effectually to all Intents, Constructions and Purposes whatsoever, as if the Testator had conveyed the same away in his Life Time; and the Books in which they are registered or recorded may be given in Evidence, and shall be accepted of and be sufficient Evidence at all Times and Places where the said Wills or Testaments may be requisite to be given in Evidence, any Law or Custom to the contrary notwithstanding.

"4. *And be it enacted by the Authority aforesaid*, That the Copies of any Last Will or Testament whatsoever heretofore made, or hereafter to be made, within any Part of the Kingdoms of Great-Britain or Ireland, by which any Lands, Tenements, Hereditaments, or other Estate within this Province, are devised or bequeathed, certified under the Seal of such Office where such Will or Testament is proved and lodged, may be given, and shall be received in Evidence, before any of the Courts of Judicature within this Province, and be esteemed as valid and sufficient as if the original Will or Testament were then and there produced and proved.

"5. *And be it enacted by the Authority aforesaid*, That the Copy of any Will or Testament, made in any other of her Majesty's Colonies, by which any Lands, Tenements, Hereditaments, or other Estate within this Province is given, devised or bequeathed, being proved according to the Custom of such Colony, certified under the Great Seal of such Colony, may be given, and shall be received in Evidence in any of the Courts of Judicature within this Province, and be esteemed as valid and sufficient as if the original Will or Testament were then and there produced and proved."[2]

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[1] By Act approved March 12, 1851, two subscribing witnesses are sufficient.

[2] Kinsey's Laws, 1732, pp. 46-48; N. J. Archives, XIII., 552; Nevill's Laws, I.,

This act impressed upon landowners the importance of having wills recorded, in case they devised lands.

A COMPLICATED ADMINISTRATION.

The limitations of the Prerogative Court in administering upon an insolvent estate in the early days find an illustration in the following case: Captain John Bowne, of Mattawan, Middletown, Monmouth county, made his will, September 14, 1714. After making a number of bequests, among others to William Hartshorne's oldest children, he gave the rest of his real and personal property to his brothers, Obadiah Bowne and Richard Saltar, whom he also appointed executors. The will was proved April 11, 1716. The personal estate was appraised at £16,982.5.0, mostly in book debts. Owing to certain difficulties in settling up the estate, the Legislature, on March 27, 1719, passed "An Act to enforce the due Administration of the Estate of Captain John Bowne, deceased, late of the County of Monmouth." Obadiah received his share of the residue, and left a will, proved April 25, 1726. The book-debts due John's estate proved uncollectible, and Hartshorne's heirs failing to receive what they considered to be coming to them filed a bill in chancery to compel Richard Saltar, the surviving executor, to pay. A decree was given in their favor, a copy served on the defendant and demand made for the money, which, however, was not paid. The Hartshornes thereupon applied to the Governor and Council, February 1, 1727–8, for leave to put in suit Saltar's bond given for the administration of Bowne's estate, in order for the recovery of the money decreed. An order was made for Saltar to show cause accordingly the following Monday. On that day, February 7, 1727–8, Saltar petitioned the Governor and Council to have the bond given by his co-executor, Obadiah Bowne, to pay the half of the debts and legacies due by the estate of John Bowne, put in suit. Both sides were heard, and an order was then made that a copy of the bond be given to Saltar that the same might be put in suit in the Supreme Court, and in case of judgment thereon

1752, pp. 37-39; Allinson's Laws, 1776, p. 27; Paterson's Laws, fol. ed. 1800, p. 5; Revision of 1821, p. 7; Rev. Statutes, 1846, p. 635; General Statutes, 1896, pp. 875-877; N. J. Archives, XIII., 520.

the Supreme Court should "Direct by proper rules that the Execut^ns from time to time on Such Judgment Shall only Issue for what Shall be Justly Incumbend on the Obligors to pay and that by directing the Auditing of Accounts & takeing Such other methods as Shall be agreable to Equity & Justice." A like order was made in the case of the Hartshornes, legatees of John Bowne, and Lawrence, one of the creditors of said Bowne, and the executors of Obadiah Bowne, against Richard Saltar, surviving executor of John Bowne, and the joint obligors with him.[1] These proceedings are interesting, as showing the cumbersome and expensive method of administering upon the estate. The aid of virtually three courts was invoked to adjudicate the matters at issue. And yet the procedure has not been so greatly simplified in the nearly two centuries that have since elapsed.

SPECIAL REMEDIAL ACTS OF THE LEGISLATURE.

The foregoing instance shows that the Prerogative Court lacked many of the powers and functions which have been vested in it by wise legislation in later years. The aid of the Court of Chancery was often invoked to assist executors and administrators in the discharge of their duties, but not infrequently it was found necessary to appeal to the Legislature for relief, and we find such acts passed from time to time as these:

An Act to enable the Executors of Miles Forster, late of Perth Amboy in the County of Middlesex, Merchant, deceased, to sell Lands to pay Debts and Legacies, according to the Last Will and Testament of the said deceased. Passed March 15, 1713–14.[2]

An Act to enable Sarah Edwards, sole Executrix and late Widow of Robert Edwards, deceased, by and with the Consent of William Cuttler, her present Husband, to make a good and lawful Conveyance of a Tract of Land sold by the said Robert Edwards in his Life-Time to one Tunis Titus by Articles of Agreement, and to receive the Remainder of the Money due for the said Lands according to the Last Will and Testa-

[1] N. J. Archives, XIV., 369, 381; XXIII., 50, 54.

[2] Ibid., XIII., 518.

ment of the said Robert Edwards, deceased. Passed March 15, 1713–14.[1]

An Act to enable Thomas Lambert, one of the principal Creditors of John Easton, late of Nottingham in the County of Burlington, deceased, and Administrator of the Goods, Rights, and Credits of the Estate or Estates of Inheritance within the County of Burlington and the County of Salem in the Province of Nova Cæsarea, to sell Lands for and towards the Payment of his just Debts. Passed March 17, 1713–14.[2]

An Act to enable certain Trustees to sell and dispose of a small Estate of Inheritance in the County of Burlington. Passed March 17, 1713–14.[3]

An Act for vesting the Lands, late the Estate and Inheritance of William Hall, Esq., late of Salem in the County of Salem, in Trustees, to be sold and disposed of for the Payment of Debts, &c. Passed January 26, 1716–1717.[4]

An Act to enable John Pittinger and Sycha Pittinger to sell and dispose of the Real Estate of Richard Pittinger, deceased, for the Payment of Debts, &c. Passed January 26, 1716–1717.[5]

An Act to enforce the due Administration of the Estate of Capt. John Bown, deceased, late of the County of Monmouth and Province of New-Jersey. Passed March 27, 1719.[6]

An Act for vesting the Lands late the Estate and Inheritance of Robert Burnet, Esq., late of the County of Monmouth in the Province of New-Jersey, in Trustees, to be sold and disposed of for the Payment of Debts. Passed March 28, 1719.[7]

As no more acts of this description were passed until after the Revolution it is possible that relief was had in such cases through the intervention of the Court of Chancery.[8] Governor

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[1] N. J. Archives, XIII., 548. [2] Ib., 552. [3] Ib., 552.
[4] Ib., XIV., 69. [5] Ib., 69. [6] Ib., 111.
[7] Ib., 114.

[8] An Act forvesting certain Lands and Tenements in the Province of New Jersey late of the Estate of John Drummond Earl of Milford in Trustees for the Payment of a Debt to Alexander Porterfield Esqr of that Part of Great Britain called Scotland, passed the Assembly, in 1730, but failed in the Council, on the technical plea that the notice of intended application for the act had not been duly advertised. *N. J. Archives*, XIV., 427-9, 435-6. It is not unlikely that the Governor had private instructions to discourage the passage of such bills.

William Burnet, who arrived in 1719, is said to have been partial to that Court, and loved to "magnify his office" as Chancellor.

GOVERNOR FRANKLIN'S FINAL ACTS AS ORDINARY.

Amid all the excitement and turmoil of the impending war, Governor Franklin went on with his accustomed duties, and among the probates of wills granted under his signature we find these, down to the last days of his administration:

Amos Benton, of Salem, will dated May 10, 1776; proved June 17, 1776, before John Carey, surrogate; probate granted same day.[1]

John Firth, will dated 30th 4th mo., 1773; proved June 20, 1776, before John Carey, surrogate; probate granted same day.[2]

Josiah Miller, of the township of South Hanover, Morris county, will dated Sept. 26, 1775; proved March 15, 1776, before Abraham Ogden, surrogate; probate granted same day.[3]

Andrew Miller, of Roxbury, Morris county, will dated May 6, 1775; proved March 25, 1776, before Richard Kemble, surrogate; probate granted same day.[4]

Letters of administration were granted, June 20, 1776, to William Nixon, administrator of the estate of Samuel Hartley, late of Salem, deceased.[5]

It is quite evident that these certificates of probate and letters of administration were signed in blank by the Governor and distributed to the surrogates. This would account for the palpable anachronism in the two following entries in the records:

Letters of administration were granted by Governor *Franklin* unto Samuel Jacques, 3d, administrator of the estate of Henry Martin, late of Middlesex county, deceased, June 27, 1776.[6]

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[1] Liber No. 17 of Wills, in Secretary of State's office, 399. [2] Ibid., 396.

[3] Liber M of Wills, 1. [4] Ibid., 434-5. This is the final entry in this volume.

[5] Liber No. 16 of Wills, 500.

[6] Liber M of Wills, 31. Governor Franklin was placed under arrest on June 17, by order of the Provincial Congress, and on June 25 was ordered to be sent to Connecticut. He was not in a position to transact any official business after his arrest.

Letters of administration with will annexed were granted on the estate of Peter Sonmans, late of Philadelphia, deceased, by Governor *Franklin*, September 9, 1776.[1]

UNDER THE STATE GOVERNMENT.

The Constitution of New Jersey, adopted July 2, 1776, provided (Sec. VIII): "That the Governor be Ordinary or Surrogate General." And (Sec. IX): "That the Governor and Council (seven whereof shall be a quorum) be the Court of Appeals in the last Resort in all Causes of Law as heretofore."

"This was never construed to give appeals from the Ordinary, and the Legislature never provided for taking such appeals. Until then, either in England or this country, no appeal had ever been given, or been had from the Prerogative or Testamentary Courts, to the Courts of Appeal in cases of law or equity."[2]

The Convention which adopted the Constitution of 1776 adopted this resolution on July 4 of that year:

"RESOLVED, That, in order to prevent a failure of justice, all judges, justices of the peace, sheriffs, coroners, and other inferior officers of the late government within this Colony, proceed in the execution of their several offices, under the authority of the people, until the intended Legislature and the several officers of the new government be settled and perfected, having respect to the present Constitution of New Jersey, as by the Congress of late ordained, and the orders of the Continental and Provincial Congresses; and that all actions, suits and processes be continued, altering only the style and form thereof, according to the terms by the said Constitution prescribed, in the further prosecution thereof."[3]

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[1] Liber M of Wills, ut supra, 505.

[2] Chancellor Zabriskie, in Harris v. Vanderveer's Exr., N. J. Court of Errors and Appeals, November term, 1869, 21 N. J. Eq. (6 C. E. Gr.), 453. (In this case the Chancellor, sitting as a constitutional member of the appellate court, voted to dismiss an appeal taken from his decree as Ordinary, and filed a dissenting opinion). See also Anthony vs. Anthony, N. J. Court of Errors and Appeals, April term, 1846, 5 N. J. Eq. (1 Halst. Ch.), 627; Hillyer v. Schenck, N. J. Court of Errors and Appeals, March term, 1863, 15 N. J. Eq. (2 McCarter), 501.

[3] Minutes of the Provincial Congress and the Council of Safety of New Jersey (reprinted), Trenton, 1879, p. 491.

The Legislature enacted, October 2, 1776: "That the several Courts of Law and Equity of this state shall be confirmed and established, and continued to be held with like Powers under the present Government, and at the same Times and Places, as they were held at and before the Declaration of Independency lately made by the Honourable the Continental Congress."[1]

This raised the question whether the Prerogative Court came under either of the categories within the scope of Sec. IX of the Constitution of 1776, or the statute just recited. On this point it was finally decided, in 1869:

["The Prerogative] Court has always been possessed of certain branches of jurisdiction which reside in the ecclesiastical tribunals in England. Hence, it has ever been regarded as an ecclesiastical court, and therefore does not properly come under the denomination of a Court of Law or Equity."[2]

The Surrogate General was, by an act passed October 8, 1778, left at liberty to employ or appoint a deputy or deputies.[3]

William Livingston having been elected Governor on August 31, 1776, by the Legislature in joint meeting, accepted, and entered upon the duties of that office on September 7. The hold-over surrogates who still had on hand the old probate blanks erased the name of Franklin and interlined that of Livingston instead. The Register of the Prerogative office began new volumes of records of wills, the first entry in Liber No. 18, page 1, being the record of the will of John Sexton, of the township of Bedminster, Somerset county, dated September 10, 1776, and proved October 14, 1776, before James Kirkpatrick, surrogate; probate granted the same day, by Governor William Livingston.[4]

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[1] Wilson's Laws, 3; Paterson's Laws, 38.

[2] Harris vs. Vanderveer's Executor, Court of Errors and Appeals, November Term, 1869, 21 N. J. Eq. (6 C. E. Gr.), 431. See also Wood v. Tallman's Exrs., N. J. Supreme Court, 1793, 1 N. J. L. (Coxe), 155, 158.

[3] Paterson, 39.

[4] Liber No. 16 contains records of probates of wills by Governor Livingston as of January 23, 1775; June 6, 1776, and September 6, 1776—all before his accession to office. These entries were all made after April 29, 1777, and after he became Ordinary. The careless use of left-over blanks explains the error. Liber No. 17 contains no records between June 17, 1776, and 1785. Liber M, of East Jersey Wills, contains no records from June 27, 1776, until 1780.

The disorganization of the governmental machinery consequent upon the declaration of the independence of New Jersey was keenly felt in the matter of the settlement of estates. Writing from Newark, June 21, 1777, to Governor Livingston, that public-spirited citizen, Joseph Hedden, junior, says: "I am daily applied to by some of the inhabitants of this place to nominate some fit person to act as deputy surrogate. There are a number of wills to be proved, and letters of administration granted, and no person in this county qualified to act in that office. If your Excellency would please to appoint Elisha Boudinot, Esq., to that office it would greatly oblige a number of the inhabitants of this town."[1]

Letters of administration were granted by Governor Livingston, dated November 21, 1777, in which he sets forth: "Know ye that at Newark on the day of the date hereof, the last will and testament of Daniel Tichenor, late of Essex, deceased, was proved before Elisha Boudinot, surrogate, who was thereunto duly authorized and appointed for that purpose, and now approved and allowed of by me." Letters were accordingly issued to Susan Tichenor, the executrix named in the will, who was required to return a true and perfect inventory unto the registry of the Prerogative Court in the Secretory's office at Burlington.[2]

SPECIAL ACTS FOR SETTLING CERTAIN ESTATES.

The uncertainty as to the jurisdiction of the courts during the Revolutionary period was also instanced by a petition from the legatees of Cornelius Johnson, presented to the General Assembly May 17, 1777, asking the House to appoint some persons to sell lands of his estate, there being no provision in the law at the time, providing for such action.

Special acts were passed from time to time, in the absence of power in the Courts to act in such matters, as follows:

An Act to confirm the Last Will and Testament of George

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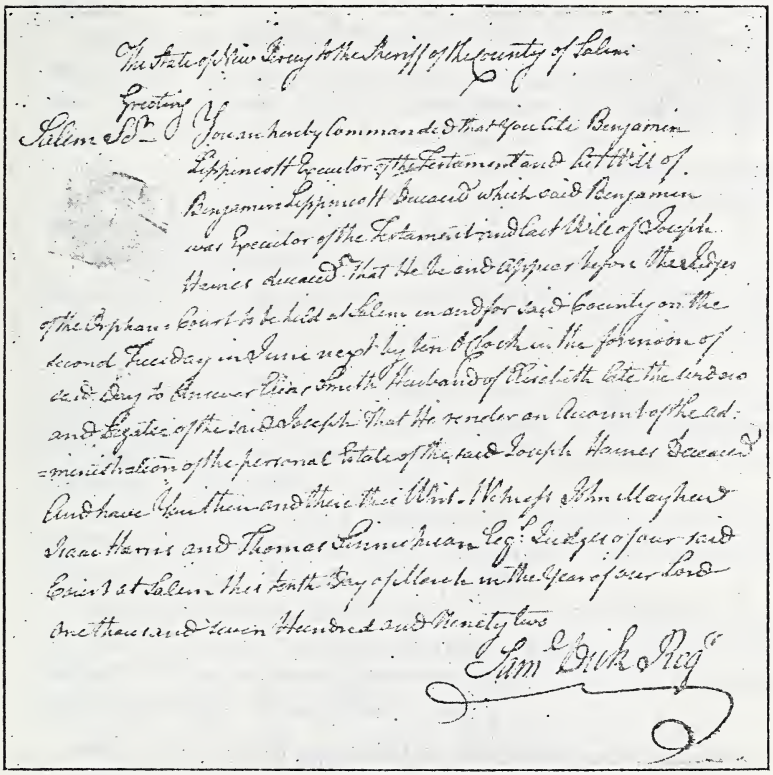
[1] Selections from the Correspondence of the Executive of New Jersey, from 1776 to 1786. Newark, 1848, p. 72.

[2] Original Letters, in New Jersey Historical Society.



The State of New Jersey to the Sheriff of the County of Salem
Greeting
Salem Sct. You are hereby Commanded that you Cite Benjamin
Lippincott Executor of the Testament and last Will of
Benjamin Lippincott Deceased which said Benjamin
was Executor of the Testament and last Will of Joseph
Homer deceased That he be and appear before the Judges
of the Orphans Court to be held at Salem in and for said County on the
second Tuesday in June next by ten of the forenoon of
the said Day to answer Lisa Smith Husband of Rebekah late the Widow
and Legatee of the said Joseph That He render an Account of the Ad-
=ministration of the personal Estate of the said Joseph Homer Deceased
And have then and there this Writ. Witness John Mayhew
Isaac Harris and Thomas Sinnickson Esq: Judges of our said
Court at Salem this tenth Day of March in the Year of our Lord
one thousand seven Hundred and Ninety two
Sam[l] Dick Reg[r]

FAC SIMILE OF CITATION TO AN EXECUTOR TO ACCOUNT, 1792.

Brown, late of the Township of Woodbridge, in the County of Middlesex, deceased. Passed May 24, 1779.

An Act to confirm the Last Will and Testament of Abraham Van-Neste, Esquire, of Millstone, in the County of Somerset, and State of New Jersey, deceased. Passed January 9, 1781.

An Act for enabling Trustees to sell and dispose of the Real Estate of Jonathan Hampton, late of Elizabeth-Town, in the County of Essex, Esquire, deceased, for the Uses and Purposes mentioned therein. Passed Dec. 19, 1782.

An Act to enable Jacob Fries, surviving Executor of the Last Will and Testament of John Jarman, deceased, to fulfil the Purposes of the said Will. Passed June 11, 1783.

An Act for remedying certain Defects in the Testament and Last Will of Thomas Shreve, late of the County of Salem, deceased, and to establish and confirm the said Testament and Last Will. Passed June 14, 1783.

An Act to confirm and establish the Testament and Last Will of James Hamilton, late of Bush-Hill, in the County of Philadelphia, of the Commonwealth of Pennsylvania, Esquire, deceased. Passed Nov. 14, 1783.

An Act to confirm and establish the Testament and Last Will of Samuel Purviance, late of Pittsgrove, in the County of Salem, deceased. Passed Nov. 27, 1783.

An Act to enable James Parker, one of the Executors of the Last Will and Testament of Doctor Lewis Johnston, deceased, in Conjunction with Bowes Reed, to fulfil the Purposes of the said Will. Passed Dec. 9, 1783.

FIRST LEGISLATION CONCERNING THE PREROGATIVE COURT.

The first legislation in New Jersey concerning the powers and duties of the Prerogative Court was a statute passed December 16, 1784, entitled "An Act to Ascertain the Power and Authority of the Ordinary and his Surrogates, to Regulate the Jurisdiction of the Prerogative Court, and to Establish an Orphan's Court in the Several Counties of this State." The preamble declares that "it is necessary that the power and authority of the Ordinary of the State, and his surrogates, should be defined, the jurisdiction of the Prerogative Court

regulated, and an Orphan's Court established in the several counties of this state."

This act provided:

"Sec. I. From and after the passing of this act, the authority of the ordinary shall extend only to the granting of probates of wills, letters of administration, letters of guardianship, and marriage licenses, and to the hearing and finally determining of all disputes that may arise thereon.

"Sec. II. For the more regular hearing and determining of all causes, cognizable before the ordinary, he shall statedly hold a prerogative court at the times and places appointed, or that hereafter shall be appointed by him, for holding the court of chancery, when he shall hear, and finally determine all causes, that shall come before him, either directly, or by appeal from any of his surrogates, or the orphan's court, hereinafter established."

"Sec. IV. The Ordinary shall hereafter appoint but one deputy or surrogate in each county of the state; and the power and authority of such surrogate shall be limited to the county for which he shall be appointed."

By Sec. V the Judges of the Court of Common Pleas, in the several counties, or any three of them, were constituted and appointed the Orphan's Court for such county, and the surrogate of the county was made the clerk or register of said court. By Sec. VII the Orphan's Court was given full power and authority to hear and determine all disputes and controversies, whatsoever, respecting the existence of wills, the fairness of inventories, the right of administration, and the allowance of the accounts of executors, administrators, guardians or trustees, audited and stated by the surrogate, with power to award process, etc. In effect, the Orphan's Courts were given the same power as the Prerogative Court, but the latter retained the original jurisdiction it had formerly enjoyed.[1]

This statute may be thus analyzed:

First. It regulated the jurisdiction of the prerogative court, by providing for the holding of stated terms of said court, for hearing and determining all causes that might come before

[1] Paterson, 59-62.

the Ordinary, either directly, or by appeal. (Sec. II.) Where disputes respecting the existence of a will, the fairness of an inventory, or the right of administration, were determined by the orphan's court, an appeal lay to the prerogative court, if demanded by one of the parties, within one month next after the sentence or decree of the Orphan's Court. (Sec. XV.) It thus vested in one officer the powers which in England had been entrusted to the Archbishop (or Prerogative Judge) and the Ordinaries, or Bishops. This same power had always been exercised by the Governors of New Jersey, as we have seen.

Second. It "ascertained the power and authority of the ordinary and his surrogates," in Secs. I, II, and IV, quoted above. In England the jurisdiction of the Ordinary extended to the collating of benefices, and other ecclesiastical functions. These had never been exercised by him in New Jersey, and the statute expressly eliminates them. The original jurisdiction of the Ordinary is clearly preserved.

This subject, particularly the scope of the act of 1784, was thoroughly reviewed in the matter of Abraham Coursen's will, at the April term of the Prerogative Court, 1843. In that case, the Ordinary (William Pennington) after reviewing somewhat briefly the history of the jurisdiction of the Prerogative Court, came to this conclusion:

"The Ordinary has the same original and appellate powers now that he ever had. He has never been deprived of these powers by any act of the legislature in fact; leaving out of view the question whether an act of that kind would be constitutional if passed at all. The acts of 1784 and 1820 are merely declaratory, so far as they attempt to specify the subjects of the Ordinary's jurisdiction, or that of his surrogates. I have, therefore, no doubt at all that the Ordinary's original jurisdiction over the probate of wills, and the granting of letters of administration, is general and full, and not limited and special."[1]

[1] 4 N. J. Eq. (3 Gr. Ch.), 415. This ruling has been followed ever since. See Lothrop's case, Prerogative Court, October term, 1880, 33 N. J. Eq. (6 Stew.), 247; Fisher's case, Prerogative Court, May term, 1892, 49 N. J. Eq. (4 Dick.), 519; Simmons case, Prerogative Court, October term, 1896, not reported; Bracher's case, Prerogative Court, May term, 1900, 60 N. J. Eq. (15 Dick.), 351 J

Third. It established an orphan's court in the several counties of the State. As already shown, Secs. VII and VIII of this act, in defining the powers and duties of this court, merely extended to the new tribunal the functions formerly exercised exclusively by the Ordinary. Other sections regulated the procedure relative to disputes concerning wills, the auditing of accounts of executors and administrators, fees, etc. "This court was instituted by law to remedy and supply the defects in the powers of the prerogative court, with regard to the accountability of executors, administrators and guardians." Sec. XIX provided that all final sentences or decrees of the orphan's courts, where no appeal was given to the prerogative court, should be subject to removal, by certiorari, into the supreme court, if applied for within three months.[1]

The novel feature of this act was the provision therein made for the protection and control of the estates of minors. Sec. IX authorized the court to exact bonds from any executor, executrix, guardian and trustee, having the care and trust of minors'

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[1] An appeal on matters of fact lay to the Governor [as Ordinary], and on matters of law to the Supreme Court. Wood v. Tallman's Ex'r, Supreme Court, 1793, 1 N. J. L. (Coxe), 156 Cozens et ux. vs. Dickinson, N. J. Supreme Court, 1809, 2 N. J. L. (Pen.) 507; Burrough et ux. vs. Mickle's Executor, N. J. Supreme Court, 1812, 3 N. J. L. (Pen.) 913-914; Ludlow vs. Ludlow's Executor, N. J. Supreme Court, 1817, 4 N. J. L. (1 South.), 392; Sulard vs. Smalley, Prerogative Court, 1824, MS. cited in 9 N. J. L. (4 Hal.) 76; and 10 N. J. L. (5 Hal.) 335; The State vs. Mayhew, N. J. Supreme Court, 1827, 9 N. J. L. (4 Hal.) 70; Tenbrook vs. M'Colm, N. J. Supreme Court, 1829, 10 N. J. L. (5 Hal.) 334-336; State vs. Hanford, N. J. Supreme Court, 1829, 11 N. J. L. (6 Hal.) 73; Delany vs. Noble, N. J. Court of Chancery, 1831, 3 N. J. Eq. (2 Gr.) 562; Van Pelt's Executor vs. Veghte, N. J. Supreme Court, 1834, 14 N. J. L. (2 Gr.) 209; Kirby vs. Coles, N. J. Supreme Court, 1835, 14 N. J. L. (2 Gr.) 576.

"In all the other cases in which a special jurisdiction is given to the Orphan's Court under the act of June 13, 1820, such as decreeing further security to be given by administrators or guardians, or revoking their letters, and on complaints under the 8th, 9th and 10th sections, and upon the 12th, 13th, 19th and 20th relative to the division and sale of lands; and upon the 30th respecting the final allowance of accounts, in all these instances, being in nowise the subject of the Ordinary's jurisdiction, as defined by the statute, nor any appeal given to him, the remedy after final sentence or decree of the Orphan's Court, is by *certiorari* out of the Supreme Court." 4 Griffith's Law Register, 1198.

This provision as to certiorari remained the law until the adoption of the Constitution of 1844, which provides (Art. VI, Sec. IV, Par. 3): "All persons aggrieved by any order, sentence or decree of the orphans' court, may appeal from the same, or from any part thereof, to the prerogative court; but such order, sentence or decree shall not be removed into the supreme court, or circuit court, if the subject matter thereof be within the jurisdiction of the orphans' court."

estates, in certain cases. Secs. XI and XII authorized the sale of lands to pay debts in certain cases, and for the support and education of minors. Sec. XIII authorized the investment of minors' money under the direction of the court. Sec. XIV provided for the partition of minors' estates. Sec. XVIII provided for the appointment of guardians of orphan minors, or of minors having no father.

"The name and idea of the Orphans' Court were borrowed, not from the English ecclesiastical courts, but from a court called the Court of Orphans, for a long time established in London and some of the other large cities of England, and which, as its name imports, had jurisdiction over the estates and persons of orphans only."[1]

This corresponds in many respects with the provisions in the Roman-Dutch law for Orphan Masters, and the powers exercised by the Burgomasters and Schepens of New Netherland, who sat as an Orphan's Court, as described on pages 15–19, ante.

By an act passed March 2, 1785, the Ordinary or Judge of the Prerogative Court was authorized to order the imprisonment of any person neglecting or refusing to obey any citations, or perform any sentence or decree made by him, until the contumacious person should obey the citation, or perform the sentence or decree.[2]

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[1] Graham v. Houghtalin, Court of Errors, June term, 1863, 30 N. J. L. (1 Vr.), 562. This was a case where a father, as guardian by nature of his minor children, obtained a decree of the Essex county orphan's court to sell the lands of said minors for their support, their father and mother having the life estate, and they the remainder. The Court of Errors set aside the sale on the ground that the children being minors, and not orphans, the orphan's court had no jurisdiction; that the father, being guardian by nature only, was not such a guardian as named in the statute. See also Genealogy of the Doremus Family in America, by William Nelson, Paterson, N. J., 1897, p. 77, for additional particulars of the case, which, however, are very fully detailed in the opinion cited.

There is a "species of guardianship that is founded on the custom of particular cities and boroughs, of which the custom of London is the most remarkable. This, we are told, entitles the mayor and aldermen, in their Court of Orphans, to the custody of the person, lands and chattels of every infant whose parent was free of the city of London (at least if he also died within the city): and such custody lasts, in the case of males, till twenty-one; of females, till eighteen or marriage. It is said, however, to be fallen into disuse."—2 Stephen's Com. on Laws of Eng., 327. See also Pulling's Customs of London, 196; Co. Litt. 88 b.

[2] Paterson, 157, Sec. 18.

A Supplement to the Orphan's Court Act of 1784, passed March 22, 1786, provided for the partition of lands devised to two or more devisees, by three indifferent persons to be appointed by the Orphan's Court of the county where the lands so devised were situated.[1]

The first general act in relation to the execution of wills was passed November 16, 1795, being entitled "An Act concerning wills." This measure was re-enacted in the revision of 1846, with very slight modifications, and stands substantially unchanged today.[2]

"An Act to regulate the Secretary's Office and the Prerogative Office in this state, and for the faithful execution of the same," passed November 23, 1795, recites that there had been much negligence in recording wills in the office of the Secretary of State, whence had arisen great confusion. The act therefore provided that the Secretary and Register should give bond for the faithful performance and execution of his duties, and subscribe an oath for the proper discharge of such duties. It also required the Secretary and Register to record with all convenient speed, legibly and fairly, all papers coming to his hands, and which might appertain to his office to record; also, to report quarterly to the Governor, and annually to the Legislature.[3]

"An act relative to guardians," passed February 1, 1799, prescribed the duties of guardians, regulated their accounting to the orphan's court, and authorized the guardian to sell the lands of the ward, adequate for his or her maintenance and education, under the direction of the court.[4] This took the place of Sec. XII of the Act of 1784.

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[1] Paterson's Laws, 77. Judge Griffith, in "Eumenes," calls attention to the extraordinary character of this legislation, which vested in three persons appointed by the court, the power which by the common law of England had always resided in a jury, and notwithstanding the fact that Section XXII of the Constitution of 1776 expressly provided "that the unestimable right of trial by jury shall remain confirmed, as a part of the law of this Colony, without repeal, forever," and Section XXIII required every member of the Legislature to take an oath that he would not assent to any law which should annul or repeal that part of the twenty-second section of the Constitution respecting the trial by jury.

[2] Paterson, 189; Rev. 223; R. S. 363; Gen. St. 3757.

[3] Paterson, 193.

[4] Paterson, 347.

Executors or administrators were authorized to sell lands of their testators or intestates, to pay debts of such testators or intestates, under the authority of the orphan's court, by Sections XIX-XXIV of "An Act making lands liable to be sold for the payment of debts," passed February 18, 1799, which repealed Secs. XI and XII of the Orphan's Court Act of 1784.[1] Another act, passed November 13, 1804, empowered the orphan's court to decree the fulfillment of contracts for the sale of lands, made in the lifetime of any testator or intestate, and to order the execution of a deed therefor by the executor, administrator or legal representatives of the deceased.[2] The provision for the sale of lands of testators or intestates for the paymant of debts was extended by an act passed February 21, 1820, to the part or parts of a share of propriety of undivided rights, or warrant to locate any land, either in the eastern or western division of New Jersey, under the direction of the Orphans' Court.[3] "An act concerning the estates of persons who die insolvent," passed June 12, 1820, embodied a revision and codification of previous statutes authorizing executors and administrators to sell lands of their decedents only by direction of the Orphans' Court.[4]

"An Act concerning surrogates, and declaring what exemplifications of wills and testaments shall be holden and received as good evidence," passed June 7, 1799, required the surrogates to make quarterly reports in writing to the register of the prerogative court, and to give bond to the State for the faithful performance of their office, etc.[5]

An act was passed June 13, 1797, "for the distribution of the estates of persons, who die, not leaving sufficient property to pay all their just debts," which provided that such estates should be distributed among the creditors pro rata, after payment of the physician's bill, during the last sickness, funeral charges, and judgments obtained and entered of record

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1 Paterson, 372-373; Rev. 430. And see Bloomfield's Laws, 3-5.

2 Bloomfield, 135; Rev. 524.

3 Rev. 670.

4 Rev. 766.

5 Paterson, 397.

during the life of the decedent.[1] This act was revised June 12, 1820.[2]

CHANGE IN THE SYSTEM OF RECORDING WILLS.

Until 1804 it was the practice, no matter where or before whom wills were proved, to send them to the Register of the Prerogative Court to be recorded—at Perth Amboy, Burlington or Trenton, as the case might be.

By an act passed November 9, 1803, a new system was instituted. It was provided in this statute that the surrogate general should, at the expense of the State, provide the several surrogates with seals, with one uniform device. Up to this time it had been the rule to record all wills in the office of the Register of the Prerogative Court, but this act provided that wills, letters of guardianship and all letters testamentary and administrations granted and issued by the surrogate, and also all inventories by him received, should be by him recorded in his office, which records should have the same force, validity, and effect, as the like records in the registry of the prerogative office. The original wills were to be transmitted quarterly to the register of the prerogative court, to be filed in his office. This continues to be the usual practice, but the original jurisdiction of the Ordinary has remained. By this act the surrogates were also vested with the powers of the Ordinary in the appointment of guardians of persons under twenty-one years, subject to an appeal to the prerogative court.[3] Where suitable offices were provided for their accommodation, surrogates were required to keep their books and records therein, by an act passed December 1, 1804.[4] It was made the duty of the register of the prerogative court, by an act passed November 25, 1808, to keep an alphabetical index of testators, and to put up the wills of each year and county by themselves; also to keep an index of intestates, inventories of whose estates he might receive, and to file such inventories.[5] This act was embodied in a revision passed May 27, 1820.[6]

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1 Paterson, 435.

2 Rev. 766.

3 Bloomfield, 96.

4 Ibid., 140; Rev. 525.

5 Ibid., 203. These indexes, covering the period from 1705 to 1804, were printed, under the direction of the Secretary of State, in two volumes, in a limited edition, in 1901 and 1902.

6 Rev. 728.

The orphan's court was given power, by an act passed March 1, 1804, to appoint guardians of idiots or lunatics, and to direct the sale of their lands for the payment of their debts, and the support of their households, if they had any.[1] This act was revised and amended, Feb. 28, 1820.[2]

Some later legislation may be briefly noted here:

Where commissioners appointed to divide lands between coparceners, joint-tenants, tenants in common, guardians of minors or trustees, should be of the opinion that the lands were so circumstanced that a partition thereof could not be made without great prejudice to the owners of the same, the court appointing them might order the commissioners or persons appointed to make partition, to sell the lands and pay the proceeds to the parties interested; the guardians of persons under the age of twenty-one years, entitled to a proportion of the moneys arising from any such sale, to be required to give bond to the Governor.[3]

Where a debtor had made an assignment for the benefit of his creditors, the assignee was required by an act passed February 23, 1820, to exhibit to the surrogate of the county an inventory and valuation of the estate so assigned, and enter into bond to the state for the faithful performance of the trust; the surrogate was directed to endorse the receipt of said bond on the deed of assignment, after which the same was to be recorded in the County Clerk's office.[4]

"A Supplement to the act relative to dower," passed February 24, 1820, gave the Orphans' Court jurisdiction in the appointment of commissioners to set off dower, with an appeal to the surrogate-general. Where a husband died seized of lands in two or more counties, the commissioners were to be appointed by the Ordinary or Surrogate-General.[5]

REVISION OF THE ACT OF 1784.

The act passed December 16, 1784, entitled "An Act to Ascertain the Power and Authority of the Ordinary and his Sur-

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[1] Bloomfield's Laws, 117. [2] Rev. 696.

[3] Act passed February 7, 1816. Rev. 593. And see act passed March 10, 1836 (Pamph. L. 1836, p. 395).

[4] Rev. 674. [5] Rev. 678.

rogates, to Regulate the Jurisdiction of the Prerogative Court, and to Establish an Orphan's Court in the several counties of the State," and all the other acts relating to the same subject, were revised and codified in a new statute with the same title, passed June 13, 1820.[1]

In this revision the plural form was followed in designating "The Orphans' Court," instead of the singular number, as in the original act. Section 1 omits the provision extending the jurisdiction of the Ordinary to marriage licenses. Section 4 provides that the Ordinary shall appoint but one deputy or surrogate in each county, whose power and authority shall be limited to such county. Section 6 of the old act, requiring the judges of the Orphans' Court to take an oath of office, is omitted. Section 7 of the new act authorizes the court to require security of guardians, and also to demand new security where the court deems that previously given to be insufficient. It omits the provision authorizing the Ordinary to grant letters of administration. Section 8 extends to guardians as well as administrators the provision in Section 7 relative to security.[2] Section 9 provides that upon the application of the surety of an administrator or guardian the court may order an investigation of his accounts, and may require security for the true payment of the balance remaining in his hands, otherwise the court may revoke the letters of administration or guardianship, and grant the same to other persons. Section 11 of the new act regulates the investment of moneys by executors, administrators, trustees or guardians, such investment to be made under the direction of the court, otherwise the executor, etc., shall be accountable for the interest that might have been made thereby; where they make use of the money of minors, the guardians shall be accountable for interest and principal. Sections 13–19 incorporate the provisions of the former act[3] relative to the partition

[1] Rev. 776.

[2] A supplement, passed March 6, 1828, makes it the duty of the court to remove executors, guardians, etc., who neglect or refuse to give security, when required by the court, and to appoint new executors, guardians, etc., who shall give security. The executors, guardians, etc., removed shall immediately deliver to their successors all goods, moneys, etc., they may have held, and in case of failure to do so may be sued for the same. Pamph. Laws, 1828, p. 192; Elmer's Digest, 368.

[3] Passed March 22, 1786. Paterson, 77.

of lands of coparceners, etc. Section 20 provides for sales of lands to satisfy judgments by authority of the Orphans' Court, as under the act of February 18, 1799. Section 21 provides that the Surrogate of each county shall take depositions to wills, administrations, inventories, and administration bonds in cases of intestacy, and issue thereon letters testamentary and of administration; cases of dispute to be heard by the Orphans' Court, subject to an appeal to the Prerogative Court. Section 26 authorizes the Ordinary or Surrogate General to cause any guardianship bond to be prosecuted in a court of record, etc. Section 27 provides "that the powers and duties formerly exercised and performed by the Ordinary, relative to the admission of guardians, for persons under the age of twenty-one years, shall hereafter be exercised and performed by the Orphans' Court of the county in which the minor applying for a guardian may reside, or shall have real or personal estate, subject, however, to an appeal to the Prerogative Court. . . . . Provided, that nothing in this act shall be construed to prevent the Ordinary or Surrogate-General, in person, from granting probates of wills, letters of administration and letters of guardianship, from the prerogative office, in cases where a convenience will arise from doing the same." Section 28 provides for the appointment of guardians of orphans of the age of fourteen years or upwards, on petition to the Orphans' Court, signed by such orphans in the presence of the surrogate; and for the appointment of guardians of orphans under fourteen years of age, upon the petition of a mother, or next of kin, etc. Section 29 requires the surrogate to enter into bond. Section 30 provides that the surrogate shall audit and state the accounts of executors and administrators, guardians and trustees, and report the same to the Orphans' Court. Section 31 provides that any executor, administrator, guardian or trustee, accounting, may be examined by the court under oath; the same section provides for the allowance of commissions. Section 32 provides that the sentence or decree of the Orphans' Court on the final settlement and allowance of such accounts shall be conclusive upon all parties, except in cases of fraud or mistake. Section 38 pro-

vides that executors, etc., shall produce receipts and discharges for the payment of legacies, etc., duly acknowledged, which shall be recorded by the surrogate in a book provided for the same. The other provisions of the act were almost precisely the same as in the original acts.[1]

It will be noticed that this act discloses a distinct purpose to transfer from the Ordinary or Surrogate-General to the surrogates, and from the Prerogative Court to the Orphans' Courts, much of the jurisdiction formerly vested exclusively in the former. This is particularly apparent in Section 27, although the jurisdiction of the Ordinary is expressly reserved by the proviso added to the section. Section 23, which authorizes the surrogates to issue letters testamentary and letters of administration, provides: "and the said probate of wills and letters of administration shall have the same validity and effect as probate of wills and letters of administration issued by the register of the Prerogative office, in the name of the Ordinary or Surrogate-General, with the seal of the office affixed."

The scope of this Revision of 1820 was carefully reviewed in the matter of Abraham Coursen's will, by the Ordinary, in 1843,[2] with the conclusion that "the Ordinary has the same original and appellate powers now that he ever had. He has never been deprived of these powers by any act of the Legislature in fact; leaving out of view, the question whether an act of that kind would be constitutional."[3] It was the view of the writer in Griffith's Law Register that the Ordinary had original jurisdiction in regard to the granting of probate of wills, etc.[4]

THE APPOINTMENT OF SURROGATES.

A remarkable encroachment on the prerogatives of the Ordinary in the matter of the appointment of surrogates was made by the Legislature in 1822, when that body assumed the power which previously had been always exercised by that functionary. An act passed November 28, 1822, provided:

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1 Revision, 1821, p. 776; Elmer's Digest, 1838, p. 362.

2 See pages 46-47, ante.

3 4 N. J. Equity Reports (3 Gr. Ch.), 410.

4 Griffith's Law Register, IV., 1197.

"The surrogates of the several counties shall be appointed by the joint meeting,[1] and hold office for five years, unless sooner removed according to law. Vacancies shall be filled by the Governor until the next session of the legislature, when his successor shall be appointed by the joint meeting for five years." [2] A measure of this kind, passed at the present day, would be interpreted by the average citizen as simply a "grab" for the "spoils of office." There is no reason to believe that the Legislators of 1822 were above the human weaknesses of their successors. It is possible that the act was intended as a step in the direction of popular government, in vesting the appointment in the representatives elected by the people, instead of in the Ordinary, who was himself appointed by the Legislature in joint meeting. A more pronounced step in that direction was taken in the constitution of 1844, which provides that the surrogates of the several counties shall be elected by the legal voters of the counties respectively and shall hold office for five years. They are subject to removal only by impeachment.

An act passed December 12, 1825, authorized "the Surrogate-General, upon the written application of a majority of the judges of the Orphans' Court of the county, supported by affidavits, to remove any surrogate incapacitated by mental derangement, insanity or great debility of mind, from properly performing the duties of his office, and to appoint some fit person to perform such duties during such incapacity, or until the next meeting of the Legislature."[3]

FOREIGN WILLS.

Foreign wills—those made beyond and disposing of property within, the Colony—had been recognized at least as early as 1686, as in the case of Edward Barker, already cited.[4] It is true that in a sense this was not a foreign will, being within the jurisdiction of the Archbishop of Canterbury. But on September 9, 1776, in the new State of New Jersey, a certified copy of the will (dated October —, 1772) of Peter Sonmans,

[1] Of the two houses of the Legislature.

[2] Pamph. Laws, 1822, p. 29.

[3] Pamph. Laws, 1825, p. 122.

[4] Page 41, ante. And see also page 42

as recorded in Philadelphia, was produced, and letters of administration with the will annexed were granted thereon, under the Prerogative seal.[1] By an act passed December 9, 1825, foreign wills were authorized to be filed or recorded in the prerogative office of this State, or in the office of the surrogate of any county, such wills to be of the same force and effect as if the probate thereon had been granted by the Ordinary or Surrogate of the county.[2] The scope of this act was two-fold: it preserved the record in New Jersey of the disposition of property within the State by the wills of non-residents; and it also placed the office of Surrogate in this matter upon a parity with that of the Ordinary.

MISCELLANEOUS ACTS.

Another act passed December 9, 1825, provided that citation or process of attachment issued out of the orphans' court might be served or executed by the sheriff of the county upon any person or persons residing without the county, but within the state.[3]

By an act of February 19, 1830, the Ordinary was authorized, where he had been interested in a case, to call to his assistance one of the justices of the Supreme Court to sit and advise with him on the hearing or argument of such case.[4]

Any oath, affidavit or affirmation required to be made or taken to use before any surrogate or any orphan's court, was authorized to be made and taken before the surrogate, by an act passed February 21, 1840.[5]

A seemingly unnecessary bit of legislation was an act passed February 25, 1842, authorizing the orphan's court and the county courts to adjourn from any day in the term to any subsequent day in the next term, but for not more than one week.[6] Probably the point had been raised that the court could not adjourn to a day beyond the term.

An important change in the practice was made by an act passed February 22, 1843, which provided that where a decree of the orphans' court on the final settlement or allowance

1 Lib. No 16 of Wills, p. 505.
2 Pamph. Laws, 1825, p. 108.
3 Pamph. Laws, 1825, p. 100.
4 Pamph. Laws, 1830, p. 54.
5 Pamph. Laws, 1840, p. 55.
6 Pamph. Laws, 1842, p. 76.

of the accounts of executors, etc , or any final decree of such orphans' court should be reversed and vacated or set aside by the Supreme Court on certiorari, the latter court (instead of sending the matter back for the action of the lower tribunal) might direct their clerk to audit and re-state the accounts, and might grant a decree thereon in the same manner as the orphans' court might have done. The act also provided that if any minor or minors should become seized or possessed of, or entitled to any real or personal estate in the lifetime of the father of such minor or minors, the Ordinary or Surrogate-General, or the orphans' court, might appoint the father or other suitable person or persons, guardian or guardians of the estate of such minor or minors.[1]

PROPOSED REVISION OF THE ORPHANS' COURT ACT.

The inadequacy of the Revision of 1820 was speedily recognized by the Bench and Bar, and in response to a very general demand for an improvement in the procedure in the Prerogative and Orphans' Courts the Legislature adopted a joint resolution, February 6, 1833, authorizing the Governor to appoint "some fit and discreet person, learned in the law, to amend, revise and adjust all acts, parts of acts and supplements relating to the Ordinary and his surrogates, and the Orphans' Court, and the practice and proceedings in all matters severally cognizable before them, or which of right ought so to be, and report at the next sitting of the Legislature."[2] Under this resolution the Governor, in April, 1833, selected Joseph W. Scott, of Somerset County, one of the ablest lawyers of the day, to prepare the report and revision in question. Col. Scott made his report February 8, 1834, and it was printed in a pamphlet of one hundred pages or more. It comprised an able and exceedingly interesting review and history of the Prerogative Court and the Orphans' Court, and of their procedure and practice, from early times. It also embraced a proposed revision and codification of the several statutes relating to those courts, and the subjects within their jurisdiction, and incorporated some radical amendments to the existing laws.[3] The

[1] Pamph. Laws, 1843, p. 84. [2] Pamph. Laws, 1833, p. 165.

[3] The only copy of this document which the writer has ever seen was destroyed in the Paterson fire, February 9-10, 1902, when his law library was consumed. What he has said of it above is entirely from recollection.

changes suggested seem to have been too numerous and too pronounced to meet with the favor of the Legislature. Accordingly, the whole subject was allowed to remain in abeyance until the adoption of the new constitution of the State, in 1844.

THE CONSTITUTION OF 1844.

By that instrument (Art. VI, Sec. I.) the Prerogative Court was made one of the constitutional courts: "The judicial power shall be vested in a court of errors and appeals in the last resort in all causes as heretofore;[1] a court for the trial of impeachments; a court of chancery; a prerogative court; a supreme court; circuit court," etc.

Whereas formerly the Governor, appointed annually by the Legislature in joint meeting, was also Chancellor, Ordinary and Judge of the Prerogative Court, which practically made only lawyers eligible to the office of Governor, the new constitution provided that the Chancellor should be nominated and by and with the advice and consent of the Senate appointed by the Governor, for the term of seven years; and that the Chancellor, so appointed, should be the Ordinary, and Judge of the Prerogative Court.

THE REVISIONS OF 1846, 1874 AND 1898.

The numerous changes made by the constitution of 1844 made imperative a general revision of the statutes. This was entrusted to a commission, of whom Henry W. Green, subsequently Chief Justice, and later Chancellor, and ex-Governor Peter D. Vroom are understood to have been the most active members. Their revision and codification of the statutes was enacted into law by the Legislature, by a series of acts approved April 16, 1846, and known as the Revised Statutes, and of course embraced a revision and amendment of the laws relating to the Prerogative Court and the Orphans' Court.[2]

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[1] In 1846 an appeal was taken from a decree of the Ordinary to the Court of Errors and Appeals, but the latter Court held that it had never possessed or exercised such jurisdiction, and had acquired no new powers by the Constitution of 1844. The subject received a new aspect when the Legislature passed an act, approved February 17, 1869, expressly authorizing an appeal to be taken from the Prerogative Court, and this was held to be constitutional, as not being an infringement upon or a reduction of the powers or jurisdiction of the latter court, but merely an elargement of the powers of the Court of Appeals.—*Pamph. Laws*, 1869, p. 84. See Anthony v. Anthony, Court of Errors and Appeals, 1846, 5 N. J. Eq., 627; Harris v. Vanderveer's Exrs, same Court, 1869, 21 N. J. Eq., cited on p. 46, ante, note.

[2] Revised Statutes, Trenton, 1847, pp. 203, 212; Revision of 1877, p. 220.

The session laws since 1846 are within the reach of everyone desiring to consult them. Hence it is unnecessary to continue this historical review further. It may be noted, however, that the statutes on these subjects were again revised, though very slightly, in 1874, when the title of the Orphans' Court Act of 1874 was altered, to read: "An Act respecting the Orphans' Court, relating to the powers of the Ordinary, the Orphans' Court and the Surrogates," approved March 27, 1874.[1]

A very careful, comprehensive and most admirably drafted revision of the Orphans' Court Act was enacted in 1898, entitled "An Act respecting the Orphans' Court" (Revision of 1898).[2]

THE PREROGATIVE SEAL.

There is reason to believe that there were a seal of the Colony, and seals of the Colonial Courts, in use in the administration of Gov. Philip Carteret, but they are not known to exist, and no impression of the court seals of his time has come down to us. The Proprietors of East Jersey were distinctly religious, and expressed their reverence for the Almighty on every suitable occasion. Their seal, adopted in 1682, bears the legends, "Righteousness exalteth a Nation," and "'Tis God giveth the increase." The earliest impression of the Prerogative seal that has been found is affixed to a certified copy of the will or codicil of Thomas French, "being with the said original Examined this Third of May Anno Dom 1699 As witness hereunto my hand & seale of office." The document is signed by Tho. Revell, Secretary and Register, and bears a very fine, clear impression of the Prerogative seal in red wax.[3] Another fair impression of the seal is found affixed to letters of administration granted July 21, 1700, to William Malcolm, of Philadelphia, principal creditor, on the estate of John Haughton, late of Mannington, Salem county, West Jersey, "by the justices of West Jersey, sitting as the Court at Gloucester, and given under the hand and seal of the Register's office at Burlington."[4]

[1] Revision, 1877, p. 745: Gen. Statutes, 1895, p. 3757.

[2] Pamph. Laws, 1898. The act is set forth in full, with notes of decisions, forms, etc., in "New Jersey Orphans' Court Practice," etc., by Charles F. Kocher, Newark, 1902, 8vo, pp. 580.

[3] Unrecorded Wills in Secretary of State's office, Lib. No. 2, p. 257.

[4] Ibid., p. 374.

A reproduction of the seal attached to the former document (1699) is given herewith. The design is not heraldic, nor is any attempt at blazonry apparent. It is evidently a conventional representation of the globe, with its embracing great circles and bands. The legend unmistakably reads: THE EARTH IS THE LORDS AND THE FVLNESE THEREOF. The sentence is undoubtedly from the first line of Psalm xxiv: "The earth is the Lord's and the fulness thereof." This is the reading of all the English versions in use in Scotland and England at the date of this seal—not only the authorized version of King James, 1611, but the Genevan or Breeches bible, 1560, and the Cranmer bible of 1539. This seal is an inch and one-sixteenth in diameter. There are no punctuation marks between the words.

When Lord Cornbury became Governor of New Jersey and appointed Thomas Revell Register of the Prerogative Court, February 28, 1703–4, it is probable that the latter procured a new seal. A fair impression of the Prerogative seal used under the Royal Governors is found affixed to letters of administration granted January 10, 1765, to Anna Wetherell, on the estate of Thomas Wetherell, late of Salem county, deceased. This seal is an inch and an eighth in diameter. The design is the same as that of the impression of 1699, but there is a punctuation mark after each word, and a fleur de lis at the end. The inscription is enclosed between raised lines, and reads: THE · EARTH · IS · THE · LORDS · AND · THE · FVLNESE · THEREOF.

After Governor William Franklin was deported from New Jersey, in June, 1776, by order of the Continental Congress, the official seals of the Province were missing. For a time Governor William Livingston, the Executive of the new State, affixed his private seal-at-arms to public documents, in the absence of a great seal of the State, and indeed this was expressly authorized by the Legislature until such time as a new seal could be procured. He stretched his authority so far as to attach his private seal to letters of administration granted on the estate of David Tichenor, in 1778.[1] Similar letters granted to

[1] Original in the Library of the New Jersey Historical Society.

PREROGATIVE SEAL 1699.
Size—One inch and one-sixteenth in diameter.

PREROGATIVE SEAL. 1765.
Size—One inch and one-eighth in diameter

PREROGATIVE SEAL. 1801.
Size—One inch and three-eighths in diameter.

the executors of Samuel Sherry, late of the county of Salem, in 1779, have no seal affixed. On January 31, 1783, letters of administration were granted to Sarah Miller, on the estate of Peter Miller, by William Livingston, Governor, and for the lack of any other convenient seal, they are issued under that of the Supreme Court. Shortly after this, however, all such instruments have attached the proper seal of the Prerogative Court. This was very similar to the old seal, but was a trifle larger. A brilliant impression of the new seal is found attached to the certificate of probate of the will of Christeen Kitts, late of Salem county, under date of March 7, 1801. This seal is an inch and three-eighths in diameter, or a quarter of an inch larger than its immediate predecessor, and five-sixteenths of an inch larger than the Colonial seal of 1699 and earlier. The design is the same as both the former seals, except that the broad dexter curved band crosses the circle of the equator more to the west of the meridian than in either of the others, and does not fully touch the periphery of the globe. The words of the legend are separated by punctuation marks as in the case of the impression of 1765, but the fleur de lis at the end has shrunk to a merely conventional figure. The greatest change, however, is in the substitution of the word EVENESE for FVLNESE, so that the legend is: THE · EARTH · IS · THE · LORDS · AND · THE · EVENESE · THEREOF. The engraver has copied from a faint impression in which the first syllable of the word in question, FVL, appeared to be EVE. This readily accounts for the mistake in the legend, for that it is an error is beyond question. This is the seal which has been in use in the Prerogative office for more than a hundred years, until now it is barely legible. No authority has been found for the use of this seal, nor has it been discovered when it was engraved. It seems to have been conceded that one of the inherent powers of a court was to adopt a seal, and that has been done by the Prerogative Court, as well as by the other tribunals of New Jersey, from the earliest times, and without express legislative sanction.

APENDIX.

COMMISSION OF THE FIRST PROVINCIAL SURROGATE.

{ L. S. }

By his Excellency Edward Viscount Cornbury Capt. Gen[ll] & Gov[r] in Cheife of her Majesties Provinces of New Yorke New Jersey and all the Territories and Tracts of Land Depending thereon in America and Vice Admirall of the Same &c.

To all to whome these Presents shall Come Greeteing

Know yee that by virtue and authority of the power unto me Granted by Letters Pattents under the Great Seal of England I have Constituted authorized and appointed and by these Presents doe Constitute authorize and appoint you Thomas Revell Esqr to Administer the usual Oaths to all Such person or persons as shall Sue out Letters of Administrations Probetts of Wills or Exhibitt Inventoryes upon oath into the Prerogative office of the Province of Nova Cesarea or New Jersey according to Such Ways and Methods and in such manner and forme as by the Lawes and Statutes in such Cases are Directed and appointed untill further Order And this shall be unto you a Sufficient Warrant for soe Doeing; In Testimony whereof I have hereunto put my hand and Seale att Armes att ffort Anne in New Yorke this 28th Day of ffebruary Anno Dm'i 1703[1] Annoque Regni Regina Annae * * * Angl' &c Secundo

CORNBURY

By His Excellencys Command

J. Bass: Sec. & Reg.[2]

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[1] 1704, New Style.

[2] Original, N. Y. Colonial MSS. (at Albany), Vol. XLIX., 9; recorded in the office of the Secretary of State, at Trenton, Liber AAA of Commissions, f. 19.

COMMISSION OF ISAAC SHARPE, AS SURROGATE FOR SALEM AND CAPE MAY, 1710–11.

By his Excellencie Robert Hunter Esq Captaine Generall and Governor in Cheif in and over the Provinces of New Jersey New York and all the territories and tracts depending thereon in America and Vice Admiral of the same &c.

To Isaac Sharp Gentleman Greeting

Whereas it hath been found inconvenient for the Inhabitants Resideing in the Remote parts of this Province to bring their Witnesses to Burlington or Amboy to prove the Wills of persons deceased or to procure bondsmen at that distance from their habitations to give security on their being admitted to Administration of the estates of such persons as shall die intestate and I have therefore thought fitt for the ease and benefit of the said persons to Commissionate and appoint you the said Isaac Sharpe to be Surrogate for the Counties of Salem and Cape May in the Western Division of the Province of New Jersey Giveing and by these Presents granting unto you the said Isaac Sharpe full Power and Lawful Authority to heare the Witnesses to Wills and to administer the Oaths to be taken by the Executors of the said Wills as also to admit Administrations on the Estates of persons who have or shall die Intestate and the Bonds for the due Administration to take in my Name and also to doe and performe all such things as to the said Office shall pertaine for soe longe Time as to me shall seeme convenient And you are to make Returne of the Wills so indorsed and the bonds of administration granted into the Secretaries Office

In Testimony whereof I have hereunto set my Hand and caused the Prerogative Seal to be affixed this fourteenth day of February in the ninth Yeare of Her Majestyies Reigne Annoq Dom 1710:

Ro Hunter

By his Excellencies Com'd

J Bass [1]

[1] Liber AAA of Commissions in Secretary of State's office, Trenton, f. 131.

HOW AN ACCOUNT WAS AUDITED BY THE COURT IN 1692.

At a private court held at ye house of Richd Bassett in Burlington ye 1st day of June 1692 called & mett together at ye request of Sarah Farr widdow & Ex^x of Elias Farr of Farrs fel in ye county of Burlington aforesd decd & Charles Backerly

Justices then prsent
Edw Hunloke
William Biddle
James Mayhew

Whereas the aforesaid Elias Farr did administer upon the estate of ye Widow Garwood late of the county aforesaid deceased and the said Charles Backerly in behalf of his wife (sister to the said widow Garwood) and of Thos Garwood & Jno Garwood (sons in law [1] of ye said widow Garwood deceased) requests the widow Farr to give ym an account of ye estate late of said widow Garwood

The inventory of Jane Garwood's estate wherewith the said widow Farr executrix is charged is - - 46 04 08

Which charge ye said Elias Farr by an account given in his lifetime there appears due by ye estate of ye Widow Garwood in ye Widow Farr's hands - - - - - 3 0 1¾

Which account hath appeared before the Justices abovesaid.

The said widow Farr thereupon paid down ye said money into Court; to be by ye Court disposed of according to law. And requests her discharge or quietus from ye Court.

The Court require ye said Charles Backerly Tho Garwood and John Garwood to declare if they have anything to object against ye account.

They have nothing to object whereupon ye Court order ye said Widow Farr to have a discharge or quietus.

She pd to Tho and John Garwood 3-0-1¾ ye balance of account and hath got her discharge in full [2]

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1 Stepsons.

2 Unrecorded Wills in Secretary of State's office, Trenton. Vol. 2. f. 263.

LIST OF SURROGATES TO 1800.

A partial list of Surrogates and Deputy Surrogates in Provincial times has been given on page 48, ante. Here is a full list to the end of the year 1800, as compiled from the Books of Commissions in the office of the Secretary of State, the books and pages being cited after each name:

1786, Mar. 17. Adams, Thomas, surrogate, Burlington county. C 3, 21.

1761, May 7. Allinson, Samuel, surrogate, prerogative court, West Jersey, vice Blackwood. 3 A, 367.

1762, Mar. 22. Allinson, Samuel, Burlington city, surrogate, prerogative court, West Jersey. 3 A, 367.

1768, —, ——. Anderson, Thomas, surrogate, Sussex county. 3 A, 434.

1716, Aug. 17. Barclay, John, surrogate for East Jersey. C 2, 21.

1767, —, ——. Bard, Samuel, surrogate, Burlington county. 3 A, 435.

1709, May 7. Basse, Jeremiah, surrogate. Appointed by Richard Ingoldsby, Lieutenant Governor.

1758, Aug. 12. Blackwood, Samuel, surrogate, prerogative court. 3 A, 330.

1767, —, ——. Blackwood, Samuel, surrogate, Gloucester county. 3 A, 435.

1761, May 7. Blond, Gabriel, Burlington city, surrogate, prerogative court, West Jersey. 3 A, 347.

1762, Mar. 22. Blond, Gabriel, surrogate, prerogative court, New Jersey. 3 A, 367.

1771, Jan. 16. Bowman, James, surrogate, Gloucester county. AB, 74.

1768, —, ——. Brearley, David, surrogate, Monmouth county. 3 A, 434.

1771, Mar. 13. Brearley, David, surrogate. AB, 76.

1774, Dec. 20. Browne, Daniel Isaac, surrogate, East Jersey. AB, 169.

1765, July 17. Burchan, Robert, surrogate, prerogative court, New Jersey. C 2, 272.

1768, —, ——. Burchan, Robert, surrogate, Burlington county. 3 A, 435.

1722, Aug. 22. Bustill, Samuel, deputy surrogate for West Jersey. 3 A, 183.

1732–3, Mar. 1. Bustill, Samuel, surrogate for West Jersey. 3 A, 244.

1774, Aug. 8. Carey, John, of Salem, surrogate. AB, 156.

1798. Dec. 26. Clark, Elisha, surrogate, Gloucester County, vice (Franklin) Davenport, resigned. C 3, 29.

1744, Aug. 11. Clark, John, surrogate. 3 A, 255.

1762, May 22. Deare, John, surrogate, East Jersey. C 2, 259.

1716, Aug. 7. de Cow, Isaac, surrogate at Burlington, for New Jersey. 3 A, 169.

1748, April 16. Dennis, Jacob, surrogate, prerogative court, Monmouth county. C 2, 176.

1762, Mar. 22. Dennis, Jacob, of Monmouth County, surrogate, prerogative court, East Jersey. C 2, 259.

1762, Mar. 22. Doane, Jonathan, Perth Amboy, surrogate, prerogative court, East Jersey. C 2, 259.

1759, Feb. 15. Doud, Aaron, surrogate, prerogative court. 3 A, 331.

1759, Mar. —. Doud, Aaron, surrogate, Sussex county. C 2, 237.

1762, Mar. 22. Doud, Aaron, Sussex county, surrogate prerogative court, West Jersey. 3 A, 367.

1696, Aug. 1. Dundas, James, surrogate for East Jersey. C, 259.

1762, Mar. 22. Ewing, Maskell, Cumberland county, surrogate, prerogative court, West Jersey. 3 A, 367.

1767, —, ——. Ewing, Maskell, surrogate, Cumberland county. 3 A, 435.

1769, Dec. 11. Frazer, Rev. William, surrogate. AB, 52.

1693–4, Mar. 8. Gordon, Thomas, surrogate for East Jersey. C, 187.

1700, Dec. 18. Gordon, Thomas, surrogate of East Jersey. C, 329.

1710–11, Feb. 14. Gordon, Thomas, surrogate ——— county. 3 A, 131.

1735, Sept. 22. Home, Archibald, surrogate for New Jersey. 3 A, 245.

1744, May 8. Homes, James, surrogate. 3 A, 256.

1763, Aug. 5. How, Micajah, surrogate, prerogative court. 3 A, 385.

1768, —— —. How, Micajah, surrogate Hunterdon county. 3 A, 435.

1767, Nov. 19. Hude, James, surrogate, prerogative court, East Jersey. C 2, 320.

1768, —— —. Hude, James, surrogate, Somerset county. 3 A, 434.

1770, Oct. 30. Hude, James, surrogate, East Jersey. AB, 71.

1762, Mar. 22. Hude. James, jr., New Brunswick, surrogate, prerogative court, East Jersey. C 2, 259.

1767, April 17. Hughs, Elijah, of Cape May, surrogate, prerogative court. 3 A, 417.

1767, —— —. Hughes, Elijah, surrogate, Cape May county. 3 A, 435.

1771, Sept, 21. Hughes, Hugh, surrogate Sussex county. AB, 93.

1720, Oct. 24. Kearny, Michael, surrogate of New Jersey. C 2, 50.

1767, April 17. Kemble, Richard, surrogate, prerogative court, New Jersey. C 2, 285.

1767, Nov. 19. Kemble, Richard, surrogate, prerogative court, East Jersey. C 2, 320.

1768, —— —. Kemble, Richard, surrogate, Morris county. 3 A, 434.

1774, Dec. 19. Kirkpatrick, James, surrogate, East Jersey. AB, 169.

1768, —— —. Kirkpatrick, William, surrogate, Hunterdon county. 3 A, 435.

1762, Mar. 22. Ladd, John, Gloucester county, surrogate, prerogative court, West Jersey. 3 A, 367.

1767, —— —. Ladd, John, surrogate, Gloucester county. 3 A, 435.

1768, May 12. Legrange, Barnardus, special surrogate, Leffertse will. C 2, 321.

1767, Nov. 19. Lefferty, John, of Somerset county, surrogate, prerogative court, East Jersey. C 2, 320.

1768, —— —. Lefferty, John, surrogate, Somerset county. 3 A, 434.

1762, Mar. 22. Leonard, Samuel, Monmouth county, surrogate, prerogative court, East Jersey. C 2, 259.

1796, Mar. 11. Lloyd, Caleb, surrogate, Monmouth county. C 3, 28.

1775, Aug. 5. McCourry (McCurry), Malcolm, surrogate, East Jersey. AB, 181.

1783, May 12. McElroy, Herbert, surrogate, West Jersey. C 3, 21.

1786, Aug. 19. McElroy, Herbert, surrogate, Burlington county. C 3, 22.

1766, June 17. Mackay, John, surrogate, prerogative court, New Jersey. C 2, 274.

1767, Nov. 19. Mackay, John, surrogate, prerogative court, East Jersey. C 2, 319.

1768, —— —. Mackay, John, surrogate, Middlesex county. 3 A, 434.

1732, Dec. 9. Mestayer, Daniel, surrogate for Salem county, vice John Rolfe, deceased. 3 A, 212.

1767, July 15. Morgan, Maurice, surrogate of the Province. AB, 1.

1744, Sept. 3. Murray, George, surrogate. 3 A, 256.

1767, Nov. 19. Ogden, Abraham, of Morris county, surrogate, prerogative court, East Jersey. C 2, 320.

1768, —— —. Ogden, Abraham, surrogate Morris county. 3 A, 434.

1768, May 12. Ogden, Isaac, surrogate, prerogative court, East Jersey. C 2, 321.

1759, Mar. —. Ogden, Lewis, surrogate, prerogative court, East Jersey. C 2, 237.

1759, Aug. 25. Ogden, Lewis, surrogate, prerogative court, East Jersey. C 2, 238.

1762, March 22. Ogden, Lewis, Newark, surrogate, prerogative court, East Jersey. C 2, 259.

1767, Nov. 19. Ogden, Lewis, Newark, surrogate, prerogative court, East Jersey. C 2, 320.

1768, —— —. Ogden, Lewis, surrogate, Essex county. 3 A, 433.

1762, Mar. 22. Ogden, Robert, Elizabethtown, surrogate, prerogative court, East Jersey. C 2, 259.

1767, Nov. 19. Ogden, Robert, Elizabethtown, surrogate, prerogative court, East Jersey. C 2, 320.

1768, —— — Ogden, Robert, surrogate, Essex county. 3 A, 433.

1772, April 16. Ogden, Robert, jr., surrogate for New Jersey, vice Robert Ogden, resigned. AB, 109.

1745, July 3. Ogden, Uzal, surrogate, prerogative court, East Jersey, C 2, 103.

1746, Aug. 20. Ogden, Uzal, surrogate, prerogative court, Morris and Essex counties. C 2, 117.

1759, Mar. —. Ogden, Uzal, surrogate, prerogative court, East Jersey. C 2, 237.

1747, Sept. 18. Read, Charles, surrogate, prerogative court. 3 A, 291.

1762, Mar. 22. Read, Charles, Burlington city, surrogate, prerogative court, East Jersey and West Jersey. C 2, 259.

1764, May 21. Read, Joseph, surrogate, prerogative court. 3 A, 392.

1770, Mar. 8. Read, Joseph, surrogate of New Jersey. AB, 53.

1800, May 5. Read, Samuel J., surrogate, Burlington county. C 3, 31.

1771, Sept. 21. Reading, George, surrogate, Hunterdon county. AB, 93.

1727, Aug. 18. Reading, John, surrogate for Hunterdon county. 3 A, 195.

1768, —— —. Reed, Bowes, surrogate, Hunterdon county. 3 A, 435.

1767, Nov. 19. Reed, Joseph, Jr., surrogate of the province. AB, 8.

1763, Aug. 5. Reid, John, surrogate, prerogative court. 3 A, 285.

1703–4, Feb. 28. Revell, Thomas, surrogate for New Jersey.

1714, April 1. Rolfe, John, surrogate. 3 A, 157.

1720–1, —— 17. Rolph, John, surrogate for Salem county. 3 A, 175.

1722, Sept. 11. Rolfe, John, deputy surrogate, Cape May and Salem counties. 3 A, 182.

1735, Oct. 13. Rose, Joseph, of Burlington, surrogate for West Jersey. 3 A, 245.

1753, Nov. 26. Russell, Jeremiah Condy, surrogate, Sussex and Morris counties. C 2, 215.

1744, Nov. —. Scattergood, Joseph, one of the surrogates of the prerogative court. 3 A, 259.

1746, July 1. Scattergood, Joseph, one of the surrogates of the prerogative court. 3 A, 262.

1747, Sept. 18. Scattergood, Joseph, surrogate, prerogative court. 3 A, 292.

1769, Mar. 2. Sergeant, Jonathan Dickinson, surrogate, Somerset county. 3 A, 436.

1745, Nov. 16. Severns, Theophilus, surrogate, prerogative court, vice John Clark. 3 A, 311.

1762, Mar. 22. Severns, Theophilus, Hunterdon county, surrogate, prerogative court, West Jersey. 3 A, 367.

1710–11, Feb. 14. Sharpe, Isaac, surrogate, Salem and Cape May counties. 3 A, 131.

1722, July 17. Smith, James, surrogate of New Jersey. 3 A, 183.[1]

1763, Aug. 5. Smith, Jasper, surrogate, prerogative court. 3 A, 385.

1768, —— —. Smith, John, surrogate, Middlesex county. 3 A, 434.

1727, Aug. 18. Smith, Lawrence, surrogate for Monmouth county. 3 A, 194.

[1] In the commission Gov. Burnet revoked, disallowed and made void all former commissions of surrogates in said Province of New Jersey. Smith appointed Samuel Bustill, of the town of Burlington, his lawful deputy surrogate of the Western Division of New Jersey, August 22, 1722.

1760, Oct. 20. Smyth (see Smith), Andrew, of Perth Amboy, surrogate for East Jersey. C 2, 241.

1762, Mar. 22. Smyth, Andrew, of Perth Amboy, surrogate, prerogative court, East Jersey. 3 A, 368.

1744, Oct. 17. Smyth, John, surrogate, prerogative court, East Jersey. C 2, 174.

1762, Mar. 22. Smyth, John, surrogate, prerogative court, East Jersey. C 2, 259.

1768, Jan. 15. Smyth, John, surrogate, prerogative court, New Jersey. C 2, 320.

1762, Mar. 22. Smyth, John, of Perth Amboy, surrogate, prerogative court, East Jersey. 3 A, 368.

Sobrisco—see Zabriskie.

1723-4, Mar. 23. Spicer, Jacob, deputy surrogate, Cape May county. 3 A, 188.

1767, Nov. 19. Taylor, John, surrogate, prerogative court, Monmouth county. C 2, 320.

1768, —— —. Taylor John, surrogate, Monmouth county. 3 A, 434.

1768, Nov. 26. Taylor, William, surrogate, Hunterdon county. 3 A, 436.

1765, July 17. Terrill, John, surrogate, prerogative court, New Jersey. C 2, 271.

1774, Oct. 22. Thomson, John, of Perth Amboy, surrogate, East Jersey. C 3, 16.

1758, Feb. 10. Trenchard, George, surrogate, prerogative court. 3 A, 327.

1762, Mar. 22. Trenchard, George, Salem county, surrogate, prerogative court, West Jersey. 3 A, 367.

1768, —— —. Trenchard, George, surrogate, Salem county. 3 A, 435.

1767, Nov. 19. Waddell, Henry, surrogate, Monmouth county. C 2, 320.

1766, —— —. Waddle, Henry, surrogate, Monmouth county. 3 A. 434.

1744-5, Feb. 15. White, Anthony, surrogate, prerogative court. C 2, 137.

1746, Oct. 13. White, Anthony, surrogate, prerogative court. C 2. 137.

1762, March 22. White, Anthony, New Brunswick, surrogate, prerogative court, East Jersey. 3 A, 368.

1762, Mar. 22. Young, Henry, Cape May county, surrogate, prerogative court, West Jersey. 3 A, 367.

1762, Mar. 22. Sobrisco (Zabriskie), John, Bergen county, surrogate, prerogative court, East Jersey. C 2, 259.

1767, Nov. 19. Sobrisco (Zabriskie), John, Bergen county, surrogate for Bergen county. C 2, 320.

1766, Nov. 26. Zabrisky, John, surrogate, Bergen county. 3 A, 433.

1768, —— —. Zabrisky, John, junior, surrogate, Bergen county. 3 A, 433.

The foregoing list gives only the appointments of surrogates whose commissions are recorded in the office of the Secretary of State, at Trenton.

Franklin Davenport, whose name is not so recorded, was surrogate of Gloucester county, 1785–1798.

PRESERVATION AND INDEXING OF ORIGINAL WILLS AND ACCOMPANYING PROBATE RECORDS.

For several years past, the Secretary of State, at Trenton, has been giving very particular attention to the preservation and indexing of the original wills and other probate records in his office. A very large number of wills filed previous to 1704, were never recorded. They were formerly kept in very loose fashion, without any system. Later they were sorted out and arranged by counties, and filed in boxes for the several counties. Through constant handling of these old papers for two centuries, many of them became much dilapidated. Within the last ten years these unrecorded wills have been treated by the Emery process, the invention of the late Francis Emery, of Taunton, Mass., and have been bound in twelve large folio volumes, in handsome and very substantial red morocco binding. By this process, the dilapidated sheets are enclosed between layers of a species of transparent silk, and are subjected to a pressure so great that the silk is practically incorporated in the paper, making it exceedingly durable, so that

it can be handled freely, and without injury, and at the same time the writing is perfectly legible.

The recorded wills from 1704 to 1800, are now in process of similar treatment. All of the wills of Bergen county, down to 1800, have been bound by this Emery process, in eight volumes.

Seventeen volumes of Burlington wills have been similarly bound, and about seven more are in process of being treated, which, when finished, will bring the bound volumes of Burlington county down to 1785. It is hoped to have Burlington finished to 1800 during the year 1910.

The wills subsequent to 1800 have been also carefully rearranged and placed in envelopes for each county, each envelope having a separate number.

The Bergen wills have been thus enveloped from 1800 to 1850.

Cape May wills, from 1800 to 1850, have been completed in envelopes.

Gloucester, Salem and Somerset have also been completely filed in envelopes to 1850, and the wills from 1850 to 1901 have been laid flat, instead of being creased in folds as formerly.

Morris and Cumberland counties are under way, wills from 1800 to 1850 being placed in envelopes as above, and filed flat from 1851 to 1901.

The wills that have been treated and bound have either been reindexed, or are being reindexed; also the wills that have placed in envelopes, and those that have been filed flat. In the new index system, each estate is given a serial number, with a separate letter for each, indicating the county; and when this index is completed it will be printed, showing each paper filed in each separate estate, as well as the book and page of record, if it be recorded. This index when printed will include all the wills down to 1900, inclusive. From that date there will be a general system of card indexing. The inventories of estates, letters of administration, letters "testimonial" or testamentary, letters of guardianship and other papers pertaining to estates are all grouped together, both in the bound volumes and in the envelopes.

The printed indexes of wills and other papers, as projected above, will be simply invaluable to all persons having occasion to consult these records.

These wills and other records are carefully preserved in steel closets in the cellar vaults of the Secretary of State, which are dust-proof and moisture-proof, the vaults being also well lighted and well ventilated. The system for preserving the records, as outlined above, is one of the most carefully perfected of any in the country. It was inaugurated under the administration of George Wurts, Secretary of State from 1897 to 1902, and has been carried on since that time and perfected under the special supervision of the Assistant Secretary of State, J. R. B. Smith.

PUBLISHED ABSTRACTS OF WILLS.

Some years ago a plan of preparing and publishing abstracts of the wills in the office of the Secretary of State was projected by the committee in charge of the preparation and publication of the New Jersey Archives. The late Berthold Fernow was employed to make abstracts of the wills, and a volume of such abstracts, from 1670 to 1730 inclusive, covering the whole State, was published in 1901, being Vol. XXIII of the New Jersey Archives, with the sub title "Calendar of New Jersey Wills, Vol. I, 1670–1730." This made a volume of 530 pages, printed in 8-point type. Appended were indexes of names of persons, names of places, and subjects, 132 pages in all. Prefaced was an historical introduction on "Early Will-Making in New Jersey," comprising pages ix to lxxxix. Colonel Fernow prepared the manuscript of two more volumes of abstracts of wills. The second volume, covering the period from 1731 to 1750, inclusive, was unfortunately destroyed in the Paterson fire in 1902. The third volume, covering the period from 1751 to 1760, inclusive, is in the Library of the New Jersey Historical Society awaiting publication. It was not deemed advisable to print this without the intermediate volume, and it has been impossible thus far to have the manuscript for the same prepared.

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INDEX

This index does not embrace the list of surrogates arranged in alphabetical order on pages 93-100.

106 + 107